CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 158

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. DONALD A. J. RAY, PETITIONER,

vs.

WALTER B. MARTIN, AS WARDEN OF ATTICA STATE PRISON, ATTICA, NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF WYOMING COUNTY, STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 23, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 158

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. DONALD A. J. RAY, PETITIONER,

vs.

WALTER B. MARTIN, AS WARDEN OF ATTICA STATE PRISON, ATTICA, NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF WYOMING COUNTY, STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under rule 234	1	1
Notice of appeal to Appellate Division	3	2
Writ of habeas corpus	4	3
Petition	5	4
Exhibit "A"—Opinion of Knight, District Judge	10	7
Exhibit "B"—Opinion of Frank, Circuit Judge	18	12
Return	20	13
Exhibit "A"—Judgment and commitment	22	15
Affidavit of Charles E. Congdon—Exhibit "A" in District Court	24	16
Opinion of County Judge denying writ	31	20
Order denying writ	50	33
Stipulation and waiver of certification	52	34
Order of settlement	53	35
Order of Affirmance by Appellate Division	55	35
Opinion of the Appellate Division, Fourth Department	57	36

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1945.

	Original	Print
Record on appeal to Court of Appeals of New York—Continued		
Order Pursuant to Order of Appellate Division and Notice of Entry	61	39
Order of Appellate Division Denying Motion for Reargument and Leave to Appeal to the Court of Appeals	63	40
Order of Court of Appeals Granting Motion for Leave to Appeal to the Court of Appeals	65	41
Notice of Appeal from Judgment Pursuant to Leave of Court of Appeals	66	41
Stipulation and Waiver of certification	67	42
Opinion, Desmond, J., Court of Appeals	69	43
Remittitur of Court of Appeals	85	55
Order on remittitur	87	57
Petition for appeal	88	57
Assignment of errors and prayer for reversal	91	59
Order allowing appeal	93	60
Citation (omitted in printing)	95	
Bond on appeal (omitted in printing)	96	
Stipulation as to record (omitted in printing)	98	
Clerk's certificate (omitted in printing)	99	
Statement of points to be relied upon	100	61
Designation of parts of record to be printed	101-A	62
Order dismissing appeal and granting certiorari	102	63

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, DONALD A. J. RAY, Relator-Appellant,

against

WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York, Respondent-Respondent

STATEMENT UNDER RULE 234

This proceeding was commenced by the service of a writ of habeas corpus on respondent. It was commenced after decisions had been rendered by the United States District Court for the Western District of New York and the United States Circuit Court of Appeals for the 2nd Circuit, both of which courts rendered opinions in connection with their decisions and both of which opinions are included in this record. The writ was issued by the Honorable Parton Swift, Supreme Court Judge of Erie County, on the 10th day of February, 1944, and required the warden to produce the body of Donald A. J. Ray, the relator, before the Honorable Barber B. Conable, County Judge of the County of Wyoming, at a term of County Court to be held in Warsaw, New York, on the 21st day of February 1944, at 2 o'clock in the afternoon. A return was made by the Warden and the matter was argued before the said Honorable Barber B. Conable, Wyoming County Judge, on the date and at the time heretofore mentioned. Subsequent [fol. 2] thereto and on the 11th day of April, the Honorable Barber B. Conable denied the writ and filed an opinion. Thereafter and on the 22nd day of April, 1944, an order was signed and filed in the office of the clerk of the County of Wyoming and a copy of the said order with notice of entry was duly served upon the attorney for the relator. A notice of appeal was duly filed in the office of the clerk of the County of Wyoming and on the 25th day of April, 1944, a copy of said notice of appeal was duly served upon the attorney for respondent.

Following argument on the Appeal to the Appellate Division, the Supreme Court, Fourth Department, on the 27th

day of September, 1944, unanimously affirmed, with opinion, the order of the County Judge of the County of Wyoming. Pursuant to the order of the Appellate Division, the order and judgment of affirmance were entered in the Office of the Clerk of the County of Wyoming on the 13th day of October, 1944.

On the 1st day of November, 1944, the Appellate Division denied a motion for reargument or leave to appeal to the Court of Appeals. Following this, a motion for leave to appeal to the Court of Appeals was made and on the 30th day of November, 1944, an order was granted by the Court of Appeals allowing the appeal. Pursuant to that order, Notices of Appeal were duly served upon the attorneys for respondent-respondent on the 7th and 8th days of December, 1944, and a duplicate of the said Notice of Appeal was duly filed in the office of the Clerk of the County of Wyoming on the 9th day of December, 1944.

There has been no change of attorneys or parties.

[fol. 3] In County Court of Wyoming County, State of New York

The People of the State of New York, *ex rel.*, Donald A. J. Ray, Relator,

against

Walter B. Martin, as Warden of Attica State Prison, Attica, New York, Respondent

Notice of Appeal

Sirs:

Please Take Notice that the petitioner above-named hereby appeals to the Appellate Division of the Supreme Court, Fourth Department from the order entered in the office of the clerk of the County of Wyoming on the 22nd day of April, 1944, in favor of respondents and against the petitioner, wherein petitioner was denied a writ of habeas corpus.

Dated: Buffalo, New York, April ——, 1944.

Yours, etc., Thomas J. McKenna, Attorney for Petitioner, Office & P. O. Address, 705 Morgan Building, Buffalo, New York.

[fol. 4] To: Nathaniel L. Goldstein, Attorney-General, Wortley B. Paul and Henry S. Manley, Assistant Attorneys-General, appearing for the State of New York and the Warden of Attica State Prison, State Office Building, Albany, New York. Beverly S. Galloway, Esq., Assistant District Attorney of Cattaraugus County, Office & P. O. Address, 514 Exchange National Bank, Olean, New York.

WRIT OF HABEAS CORPUS

THE PEOPLE OF THE STATE OF NEW YORK,

To Dr. Walter Martin, Warden of Attica State Prison:

We Command You, That you have the body of Donald A. J. Ray by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Donald A. J. Ray is called or charged, before the Hon. Barber B. Conable, County Judge of the County of Wyoming at the courthouse, Warsaw, New York on the 21st day of February 1944, at 2 o'clock in the afternoon of that day to do and receive [fol. 5] what shall then and there be considered concerning the said Donald A. J. Ray and have you then and there this writ.

Witness: Hon. Parton Swift one of the judges of the Supreme Court of Erie County, the 10th day of February One thousand nine hundred and forty-four.

(Seal of County Clerk affixed to original.)

Harry C. Vackel, Clerk.

Thomas J. McKenna, Petitioner's Attorney, 705 Morgan Bldg., Buffalo, N. Y.

IN SUPREME COURT OF NEW YORK, ERIE COUNTY

PEOPLE OF THE STATE OF NEW YORK, ex Rel., DONALD A. J. RAY, Petitioner,

against

DR. WALTER MARTIN, Warden of Attica State Prison, Respondent

PETITION

To: Hon. Parton Swift, Justice of the Supreme Court.

The petition of Thomas J. McKenna, Attorney, herein respectfully shows to this Court:

[fol. 6] First: That Donald A. J. Ray, the person in whose behalf the writ is applied for, is now imprisoned and restrained in his liberty. That said prisoner is now confined in the State Prison at Attica, New York, in the County of Wyoming, State of New York, and that the officer or person by whom he is so imprisoned and restrained is as follows: Dr. Walter Martin, Warden of Attica State Prison.

Second: That he has not been committed, and is not detained by virtue of any judgment, decree, final order, process or mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

Third: That prisoner was indicted by the Grand Jury of Cattaraugus County on the 20th day of September, 1939, for the crime of murder in the first degree, alleged to have been committed on the 16th day of September, 1939, in the City of Salamanca in said County. That prisoner is a citizen of the United States and not an Indian.

Fourth: That the first count charged him with intentional killing with premeditation and deliberation.

Fifth: That the second count charged the defendant with so-called felony murder, it being alleged that the killing of decedent took place while the prisoner was engaged in the commission of robbery.

[fol. 7] Sixth: That he was brought to trial under said indictment in Supreme Court at Little Valley on the 4th day of December, 1939.

Seventh: That at the close of the evidence at that trial, the Court granted the prisoner's motion to dismiss the first charge and submitted the case to the jury on the second charge alone.

Eighth: That the verdict was returned on the 11th day of December, 1939, and the prisoner having been found guilty by a Supreme Court Jury on the charge of Murder, first degree, was sentenced on December 15, 1939, to be confined in Attica State Prison for the term of his natural life.

Ninth: That the prisoner is now confined in said Attica State Prison for the term of his natural life under a commitment of the Supreme Court of Cattaraugus County.

Tenth: That said commitment at Attica State Prison and detention therein is illegal and contrary to Statute and the Constitution of the United States.

Eleventh: That the *locus in quo* is within an Indian Reservation governed by Treaties and Federal Statutes and the State of New York cannot extend its laws into said place in the absence of Treaties or Federal Statutes permitting same.

Twelfth: That there is no treaty or federal statute which permits the State of New York to extend its laws into the place in question and, particularly, for the crime of murder, first degree.

[fol. 8] Thirteenth: That the Supreme Court of the State of New York has erroneously and illegally assumed jurisdiction of the offense and has erroneously and illegally and contrary to the Statutes of the United States and the Constitution of the United States, issued a commitment under which the defendant is now incarcerated at the State Prison at Attica, New York.

Fourteenth: That Paul N. Balsiger, the deceased whom the prisoner was convicted of murdering, was a white man and not an Indian.

Fifteenth: That the place where the crime was committed was within the City of Salamanca and located within the Allegany Indian Reservation.

Sixteenth: That an appeal was taken to the Appellate Division of the Supreme Court, Fourth Department, where the conviction was affirmed.

Seventeenth: That leave to appeal to the Court of Appeals was denied.

Eighteenth: That the jurisdiction of the Supreme Court of the State of New York to try the prisoner was not challenged during the trial or on appeal.

Nineteenth: That no previous application has been made for a writ of habeas corpus in this case except an application for an order for a writ which was made to the United States District Court for the Western District of New York and which order was denied by the United States [fol. 9] District Court Judge under an opinion signed in said case on July 12, 1943, and filed on July 19, 1943. That annexed hereto and marked Exhibit "A" is a copy of that opinion. An appeal was taken from an order entered in the United States District Court on that opinion to the United States Circuit Court of Appeals for the Second Circuit and the judgment of the District Court, denying the order, was affirmed, as more fully appears by an opinion of the said United States Circuit Court of Appeals for the Second Circuit, which is hereto annexed and marked Exhibit "B."

Twentieth: That the prisoner be produced in court on the return day of the writ in civilian clothes.

Wherefore, petitioner asks this court to issue a writ of habeas corpus so that the jurisdictional question urged in this case be decided and the rights in the case become authoritatively settled on the hearing of such writ.

Thomas J. McKenna, Petitioner.

Dated: Buffalo, N. Y., February 9, 1944.

(Verified by Thomas J. McKenna, February 9, 1944.)

[fol. 10] EXHIBIT "A" TO PETITION

OPINION

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Misc. Civil

In the Matter of

The Application of DONALD A. J. RAY, Petitioner, for the issuance of a Writ of Habeas Corpus

Appearances: Thomas J. McKenna; for Petitioner; Beverly S. Galloway; Assistant Dist. Atty.; for County of Cattaraugus; Nathaniel L. Goldstein; Attorney General; Wortley B. Paul; Henry S. Manley; Assistant Attorneys General of Counsel; for the State of N. Y.; George L. Grobe, U. S. Attorney; for U. S.

KNIGHT, District Judge:

Petitioner, a white man, on December 4, 1939, in the Supreme Court, Cattaraugus County, New York, was convicted and sentenced to life imprisonment for murder of a white man, in the City of Salamanca, Cattaraugus County, New York. The locus of the murder lies within the Allegany Indian Reservation; all the lands within the City of [fol. 11] Salamanca being leased from the Seneca Nation of Indians. The conviction aforesaid was affirmed in the Appellate Division of the Supreme Court of New York and leave to appeal to the Court of Appeals of that state denied. In none of the proceedings has the question of jurisdiction been raised until the present. Petitioner, applying for writ of habeas corpus, contends the courts of New York State have no jurisdiction of the offense charged within the City of Salamanca. The county and state, with the United States concurring, seek a denial of the writ on several grounds. It is asserted that the application here is prematurely made, because the petitioner has not exhausted his remedies in the state court. It does appear that no application for writ has been made in the state courts. It has repeatedly been held that one must avail himself of the remedies in the state courts before he can seek relief through habeas corpus in this court. The rule

is distinctly stated in Jones v. Dowd, 128 F. (2d) 331, 334, wherein the court said:

> "A litigant in a State court is not at liberty to set in motion the jurisdiction of the Federal court by a petition for a writ of habeas corpus charging the State court has denied him due process under the Fourteenth Amendment, until the State has been given a chance to make its record under this same writ. The orderly administration of justice demands it."

To the same effect, see also: Mooney v. Holshan, 294 U. S. 103, 115, Stonefield v. Buchanan, 124 F. (2d) 23.

[fol. 12] There is a further rule relating to the writ of habeas corpus in situations such as presented herein. It is distinctly stated in U. S. *ex rel.* Lesser v. Hunt, 117 F. (2d) 30, 31, which arose in this District, as follows:

> "As we have several times said, intervention by lower federal courts in such cases is justified only in the rarest instances; that is, only when the state courts will not, or cannot, do justice, * * * his remedy, if he had any, was only by application to the Supreme Court of the United States by certiorari."

The rule of comity requiring further proceedings to be taken before the United States Supreme Court, where a prisoner has been convicted in state courts and pursued his remedies of appeal therein, is also followed in other Circuits. See Johnson v. Wilson, 131 F. (2d) 1; Kramer v. Nevada, 112 F. (2d) 417; Jones v. Dowd, 128 F. (2d) 331; U. S. *ex rel.* Parker v. Carey, 135 F. (2d) 205.

Petitioner contends that exceptional circumstances are presented herein which should lead the court to exercise its discretion to issue the writ, citing in support thereof Bowen v. Johnson, 306 U. S. 19. An inspection of that case does not reveal any question of conflicting review by a federal court of a state court system, and I do not believe the language of the opinion should be so extended. It seems to me that any discretion in the court should be exercised in favor of the state. U. S. *ex rel.* Parker v. Carey, *supra.*

[fol. 13] In view of the foregoing I am of the opinion that the petition is insufficient in law and that the petitioner has chosen the wrong forum for relief, if he is entitled to any.

If I am in error in the above conclusion, it seems to me that the motion must be denied for another reason.

Originally New York and Massachusetts claimed sovereignty over the land in question, each under a crown grant from England. The dispute was settled in 1786 with Massachusetts ceding sovereignty to New York. The United States Constitution was adopted in 1787 taking away the power of the states of negotiating treaties in the constitutional sense and in due course of time treaties with the Indians required the concurrence and approval of the national government. In 1871 by Act of March 3, 1871, (Sec. 2079 Rev. Stat.) the course of dealing with the Indians by treaty was abolished and in place therefor was substituted congressional action.

Under the Constitution there is no literal phrasing giving Congress the power of sovereignty in derogation of state sovereignty over the Indians. However, this has always been an implied power, and the Indian has been referred to as the ward of the nation, U. S. v. Kagama, 118 U. S. 375, U. S. v. National Gypsum Co., 40 F. Supp. 206, 210, and this power has extended to cover both the Indian and the reservation. Under the Constitution it is thus evident that the states have lost exclusive sovereignty over the [fol. 14] Indians, and the question is presented to this court whether or not New York State has been relieved of its sovereignty in this case, the answer depending upon whether or not Congress has evinced any intent in the premises. If Congress has legislated to prescribe exclusive federal jurisdiction over the crime involved herein, the state law must bow thereto. U. S. v. National Gypsum Co., *supra;* U. S. v. Forness, 125 F. (2d) 928, 932.

Petitioner contends that Section 217 U. S. C. A., Title 25, extends the general laws of the United States to the Allegany Reservation and as a corollary thereto extends U. S. C., Title 18, Sec. 451, sub. sec. 3 and sec. 452, the former prescribing exclusive jurisdiction in the United States over crimes defined in the Chapter which includes the latter, or Section 452, defining murder and which includes the acts involved herein—homicide in the perpetration of a robbery. The crux of petitioner's contention lies in the interpretation of Section 217, Title 25 U. S. C. The language of that section is as follows:

> "Except as to crimes the punishment of which is expressly provided for in this title, the general laws

of the United States as to the punishment of any crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

Does the language above quoted "Indian Country" include the City of Salamanca? An examination of Title [fol. 15] 25, Chapt. 6, Secs. 211 and 266 shows that the phrase "Indian Country" is used therein unnumberable times. Although ordinarily it would be presumed that the meaning of this phrase would be the same in each instance, this construction would yield if an inspection shows that different meanings were intended in the various uses. Section 219 prescribes requirements for the "Indian Country"; Section 220 authorizes passport requirements for the "Indian Country"; Section 220 authorizes removal of certain persons from the "Indian Country"; while Section 222 authorizes removal from "any tribal reservation"; Section 242 specifically defines Osage County, Oklahoma, as "Indian Country", but only within statutes prescribing the sale of intoxicants. Section 1 of the Act of 1834 defines "Indian Country" as land west of the Mississippi with certain exceptions. From the foregoing it is evident that the term "Indian Country" has been used in various meanings by Congress, and it is necessary to examine the particular section and circumstances to determine the meaning intended.

It is said that the term "Indian Country" embraces all land within the United States to which the Indian title has never been extinguished. *Ex parte* Crow Dog; 109 U. S. 556. In U. S. v. Leathers, 26 F. Cas. 16, 581, pp. 897, 899, it is stated:

> "From the earliest period of our history the boundaries of the Indian country have been narrowing. • • • The policy has been to separate the Indian tribes from [fol. 16] the rest of the people, and to set apart for their exclusive use specific portions of the public domain. The statutes cited show that 'Indian Country' is the term used generally to describe country in the occupation of the Indians, to which their title or right of occupancy • • • has not been extinguished. • • •".

No cases are cited by or on behalf of petitioner which apply Section 217, Title 25, and Section 542, Title 18, to a similar set of facts as are herein presented.

Objectively it appears that there are six to eight Indian families residing in the City of Salamanca having a total population of about 9,000. During the last 40 years several murder cases have been prosecuted to conviction in the state courts as have generally all felonies where Indians have not been involved. Under the Act of February 19, 1875, 18 Stat. 330, the municipal laws and regulations of New York were extended over the leased property and since incorporation as a city in 1913, all petty crimes, Indian or otherwise, have been prosecuted in its City Court. The United States Attorney appearing herein has presented the administrative view that New York State has jurisdiction, citing U. S. v. McBrantney, 104 U. S. 621, and Draper v. United States, 164 U. S. 240. The administrative view and the *de facto* jurisdiction assumed by the New York courts, while not controlling on this decision, should be accorded great weight, having existed a long period of time without any congressional change. See: U. S. v. American Trucking Assns., 310 U. S. 534.

[fol. 17] In view of the foregoing, I hold that Congress has not prescribed exclusive federal jurisdiction over the acts herein for which petitioner has been convicted, and I conclude that New York State law controls unless and until Congress passes legislation superseding it.

Petitioner contends that the rule of U. S. v. Forness, 125 F. (2d) 928, is determinative here. The decision in that case was that Congress having enacted laws with respect to Indian leases in Salamanca, New York State law with respect to leases was superseded. Such is the holding of the Second Circuit, and this opinion is not in conflict therewith. My holding is that Title 25, Sec. 217, U. S. C., does not extend the general criminal laws over the City of Salamanca.

As a result, the state law of New York applies, and the courts of that state correctly and properly assumed jurisdiction in the judgment and sentence of petitioner, and I hold that the motion and petition for the writ of habeas corpus must be denied.

In view of the foregoing, it is unnecessary to decide whether or not petitioner, by failing to raise the question

of jurisdiction in the prior proceedings, has waived his right to do so now.

July 12, 1943.

John Knight, United States District Judge.

Filed July 19, 1943.

[fol. 18] EXHIBIT "B" TO PETITION

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 177—October Term, 1943

(Argued January 13, 1944—Decided January 28, 1944)

UNITED STATES OF AMERICA, ex rel., DONALD A. J. RAY, Relator-Appellant,

vs.

WALTER MARTIN, Warden of Attica State Prison, Respondent-Appellee

Before: Swan, Clark and Frank, Circuit Judges

Appeal from an order of the District Court for the Western District of New York denying relator-appellant's petition for a writ of habeas corpus. Affirmed.

Thomas J. McKenna, Buffalo, New York (James B. McKenna and Benjamin Galperin, of counsel) for relator-appellant; George L. Grobe, Esq. (R. Norman Kirchgraber, of counsel) Buffalo, New York, *Amicus Curiae;* Nathaniel L. Goldstein, Attorney General of State of New York, Wortley B. Paul and Henry S. Manley, Assistant [fol. 19] Attorneys-General, and Beverly S. Galloway, Olean, New York, for respondent-appellee.

FRANK, Circuit Judge:

Relator-appellant was convicted and sentenced in the Supreme Court of Cattaraugus County, New York, to life-imprisonment for murder of a man, in the City of Salamanca, New York, which lies within the Allegany Indian Reservation, all the land within the City of Salamanca being leased from the Seneca Nation. Relator-appellant

is not an Indian, nor was the murdered man. The conviction was affirmed in the Appellate Division of the New York Supreme Court; leave to appeal to the Court of Appeals of that State was denied. In the proceedings in the State court, relator-appellant did not raise the question of jurisdiction. He made no application for a writ of habeas corpus in the State court, but applied for such a writ in the court below. Relying largely on our decision in *United States v. Forness*, 125 F. (2d) 228, he asserted that, under the federal statutes and treaties with the Seneca Nation, the State court had no jurisdiction whatsoever of a trial for murder occurring in Salamanca. The court below made an order denying the application for the writ. From that order relator-appellant appeals.

We agree with the contention made by the State of New York, through its Attorney General, and by respondent, that the application for the writ to a federal court was prematurely made. Save in most exceptional circumstances, the writ will not issue if the relief sought is from [fol. 20] the judgment of a State court where the petitioner has not exhausted his remedies in the State court and has not shown that the State court will not, or cannot, do justice. There is no showing whatever here that justice will be denied in the State court, and none of the exceptional circumstances, noted in the cases cited, here exist.

Affirmed.

CLARK, Circuit Judge (concurring):

I concur in the decision herein on the ground stated in the opinion, as well as upon the additional and alternative ground also relied upon by the District Court, July 19, 1943.

Here the Court cited numerous cases covering the question of the selection of the proper forum for relief. They are not cited because they have no bearing on the present question.

IN COUNTY COURT OF WYOMING COUNTY

RETURN

[Same Title]

To the County Court of Wyoming County:

I, Walter B. Martin, as Warden of Attica State Prison, Attica, New York, in obedience to a writ of habeas corpus issued pursuant to the direction of Honorable Parton Swift, Supreme Court Judge, on the 10 day of February, 1944, on the petition of Thomas J. McKenna, Esq., attorney for relator herein, sworn to the 9th day of February, 1944, which [fol. 21] writ required me as such warden to produce the body of Donald A. J. Ray before Honorable Barber B. Conable, Wyoming County Judge, at a term of court to be held at Warsaw, New York, on the 21st day of February, 1944, at two o'clock in the afternoon, respectfully return:

First: At the time the said writ of habeas corpus was served upon me I had in my custody, as said warden, the body of one Donald A. J. Ray, whom I believe to be the same person mentioned and described in said writ.

Second: That the said prisoner was heretofore received at Attica State Prison, in pursuance of a judgment and commitment under which he is held by me as such warden, a copy of which is hereto attached and marked Exhibit "A".

Third: That the said prisoner is now being held by me by virtue of the final judgment of a court of competent criminal jurisdiction, and said judgment and sentence are still in full force and effect and the sentence of said relator has not expired, and pursuant to the command of said writ I have here before you the body of the said Donald A. J. Ray.

Fourth: That respondent admits the allegations contained in paragraphs First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Fourteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth, and admits that the crime was committed in the City of Salamanca.

[fol. 22] Fifth: That respondent denies the allegations contained in paragraphs Tenth, Eleventh, Twelfth, Thirteenth and Fifteenth, except as hereinbefore admitted.

Wherefore, the writ of habeas corpus herein should be dismissed and the relator remanded to my custody as

warden of Attica State Prison New York, to be held by me subject to said judgment and commitment.

Walter B. Martin, Warden, Attica State Prison.

(Verified by Wortley B. Paul.)

EXHIBIT "A" TO RETURN

At a term of the Supreme Court held in and for the County of Cattaraugus, in the Village of Little Valley, at the Court House on the 4th day of December, 1939.

Present: Hon. Alonzo G. Hinkley, Justice Presiding

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

DONALD A. J. RAY, Defendant

The defendant above named having been convicted in this Court on the 11th day of December, 1939, of the crime [fol. 23] of Murder in the first degree with a recommendation from the Jury that he be imprisoned for the term of his natural life, personally appears this day for judgment. The defendant is now asked by the Clerk of this Court whether he has any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being alleged or appearing to this Court why such judgment should not be pronounced, judgment is thereupon pronounced that the said defendant be imprisoned at hard labor in the State Prison at Attica, New York, for the term of his Natural Life.

The defendant testifies that he is 20 years of age, and was born in Bradford, Pa., and is by occupation a Laborer.

I Hereby Certify the foregoing to be a true copy of the entry of judgment upon the minutes in the above entitled action.

Witness my hand and the Seal of said Court this 15th day of December 1939.

(S.) Ernest E. Bennett, Special Deputy County Clerk of Cattaraugus County. (Seal.)

From an examination of the records it appears that the defendant above named spent 92 days in a prison or jail prior to his conviction and before his sentence on the within named charge.

(S.) James V. Rogers, Sheriff, Cattaraugus County.

[fol. 24] AFFIDAVIT OF CHARLES E. CONGDON

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

In the Matter of the Petition of DONALD RAY for a Writ of Habeas Corpus

STATE OF NEW YORK,
County of Cattaraugus, ss:

Charles E. Congdon, being duly sworn, says he is an attorney and counsellor at law duly admitted to practice in this Court, residing at the City of Salamanca, N. Y. That for upwards of forty years last past deponent has resided and practiced his profession in the City of Salamanca, which is located almost wholly on the Allegany Reservation of the Seneca Nation of Indians, and during that time has become and is familiar with the history of the laying out, the location, the boundaries and general situation of said Allegany Indian Reservation and also with the history of the location, settlement and organization of the City of Salamanca.

That the charter of the Colony of Massachusetts Bay granted by King Charles the First in 1628 gave to that Colony a strip of land extending from the Atlantic to the [fol. 25] Pacific which apparently included all western New York State. In 1664 Charles the Second gave to this brother James, the Duke of York, another grant of all the land abutting upon the Connecticut and Hudson's Rivers together with "full and absolute power and authority to correct, punish, pardon, govern and rule all such subjects of us, our heirs and successors as from time to time adventure themselves into any parts or places aforesaid." After the Revolution the conflict of authority and title to the territory then constituting the Colony of New York was settled by what is known as the Hartford Convention adopted December 16, 1786. By this Convention the Commonwealth of Massachusetts ceded to the State of New York forever "all the claim, right and title which the Commonwealth of Massachusetts hath to the government sovereign and jurisdiction of the lands and territories so claimed by the state of New York as hereinbefore stated and particularly de-

scribed." The State of New York ceded to the Commonwealth of Massachusetts "the right of preemption of the soil from the native Indians and all their estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted)," to lands in western New York which included all of Cattaraugus County. The title to the land in western New York was conveyed by Massachusetts to Robert Morris.

When the Constitution of the United States was approved by the convention of delegates September 17, 1787 and [fol. 26] submitted to the different states it contained the provision in Section 8 that Congress should have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The grant to Massachusetts Bay may be found at page 94 in the Report on the Indian Problem made to the New York Assembly. February 1, 1889, Assembly Document No. 51, 1889. The grant to the Duke of York is at page 100 in the same book and the Hartford Convention at 105.

The Allegany Indian Reservation was laid out pursuant to a deed dated September 15, 1797 from the Seneca Nation of Indians to Robert Morris whereby the Seneca Nation conveyed to Robert Morris, his heirs and assigns forever a large tract of land in the western part of New York State and including the County of Cattaraugus in which the Allegany Indian Reservation and the City of Salamanca are located, but excepting "one other piece or parcel of 42 square miles at or near the Allegany River." This deed contained the further provision "and it is hereby understood by and between the parties to these presents, that all such pieces or parcels of land as are hereby reserved, and are not particularly described as to the manner in which the same are to be laid off shall be laid off in such manner as shall be determined by the sachems and chiefs residing at or near the respective villages where such reservations are made, a particular note whereof to be endorsed on the back of this deed and recorded therewith, together with all and singular the rights, privileges, hereditaments and appurtenances [fol. 27] thereunto belonging or in anywise appertaining." This deed may be found at length in the New York State Assembly Report on the Indian problem, being Assembly Document No. 51 of 1889 at Page 131. It is also published in United States Senate Documents No. 39, Volume 2 of the 58th Congress, Second Section, at page 1027.

The actual survey of the reservation was made by Richard M. Stoddard commencing September 20, 1798 and completed October 21, 1798. The field notes of this survey are Volume 49 of the Holland Land Company in the office of the New York Secretary of State at Albany. I have a copy of these field notes certified by the Secretary of the State of New York and am familiar with the boundary lines of the Alleghany Reservation adjacent to the City of Salamanca. The street known as Wildwood Avenue in the City of Salamanca is wholly located on the Allegany Indian Reservation laid out as aforesaid.

Pursuant to Act of Congress adopted February 19, 1875 (18 Stat. 330) three commissioners were appointed to lay out certain villages on the Allegany Reservation among which was the Village of Salamanca. These are referred to as U. S. Commissioner's villages, but were not villages in the municipal sense but merely certain limited tracts of land. The municipal Village of Salamanca was organized under its charter which is Chapter 507 of the Laws of 1913. The former municipal village of Salamanca had a police justice and was part of the Town of Salamanca, which [fol. 28] had four Justices of the Peace and who held the customary Justice's Courts within the Village of Salamanca and on the Allegany Indian Reservation until the City of Salamanca was organized in 1913. After that time the territory within the City of Salamanca ceased to be a part of any town and both civil and criminal jurisdiction has been lodged in the City Court created by the City Charter. The City has its own police force, the employees of which are given the powers of constables within the City. The Supreme and County Courts and the Sheriff of Cattaraugus County have always asserted and exercised jurisdiction within the City of Salamanca in exactly the same manner as such jurisdiction has been exercised in the towns of Cattaraugus County outside the Indian reservation. There was formerly for many years a U. S. Commissioner located at Salamanca and a U. S. Deputy Marshal residing there, who exercised the usual powers of U. S. Commissioners and Deputy Marshals, their activities being usually limited to the arrest of persons charged with selling liquor to Indians, but for about twenty-five years last past there has been no U. S. Commissioner or Deputy Marshal located at the City of Salamanca. To deponent's knowledge all crimes which are made such by the Laws of the State of

New York have been prosecuted during the forty years last past within the City of Salamanca in exactly the same way as though they had been committed elsewhere within the County of Cattaraugus in localities not on the Indian Reservation and only such crimes as were charged to have [fol. 29] been committed outside the City of Salamanca or which were peculiarly offenses under the United States statutes have been customarily prosecuted before a U. S. Commissioner or in the District Court of the United States at Buffalo. So far as deponent knows there has not been up to the present time any question raised in the Courts of Cattaraugus County as to the jurisdiction of the Courts of the State of New York over the territory within the City of Salamanca. Several murders and other serious crimes with the prosecution of which deponent has been professionally connected within the past forty years, which were committed within the City of Salamanca have been prosecuted to convictions.

The Act of 1875 above referred to authorized the giving of leases of land within the present City of Salamanca by the Seneca Nation of Indians. Leases of a large part of the territory in said City for twelve years were granted in 1880. When they expired in 1892 they were renewed for the term of Ninety-nine years, pursuant to an Act of Congress approved September 30, 1890 (29 Stat. 558) and substantially all the land in said City including the lands adjacent to Wildwood Avenue are now held under leases for the term of Ninety-nine years, which expire February 19, 1991. By Section 71 of the New York State Indian Law, which was Chapter 188 of the Laws of 1881, the title of the tenants under these ninety-nine year leases is made a freehold estate. The territory within the Commissioner's [fol. 30] villages including Salamanca was made part of the several towns within which they were located and all the general Laws of the State of New York were extended over the territory of these villages.

Prior to the granting of twelve year leases in 1880 there was only a small scattering settlement in what is now the City of Salamanca. Within two or three years subsequent to 1880 numerous brick business blocks and commodious residences were built, the present streets were laid out and since that time the growth of the Village and City has been continuous. The City of Salamanca now has a popu-

lation of about 9,000. The Erie, B. & O. and Pennsylvania Railroads run through the City on the Allegany Indian Reservation. The City contains several large manufacturing plants, a federal post office, two banks, a large high school building, numerous business blocks and substantial private residences. It is inhabited almost exclusively by white people, there being only about six or eight Indian families residing within the City, only one of which owns land within the City.

Charles E. Congdon.

Sworn to before me this 24th day of April, 1943.
C. E. White, Notary Public.

[fol. 31] IN COUNTY COURT OF WYOMING COUNTY

OPINION OF COUNTY JUDGE DENYING WRIT

[Same title]

The relator was indicted by a grand jury of the County of Cattaraugus for the crime of murder in the first degree alleged to have been committed September 16, 1939, in the City of Salamanca in said County. He was convicted upon the second count of the indictment which charged a killing by the relator while engaged in the commission of a robbery. Upon this conviction he is now confined in the Attica State Prison for life. The relator is, and the deceased was, a white man. The relator now claims in this proceeding that his imprisonment is illegal, that the judgment of conviction is void, that the crime was not cognizable by the laws of the State of New York but was solely within the jurisdiction of the Federal Courts. An appeal from the judgment of conviction was taken to the Appellate Division of the Supreme Court where it was affirmed. Leave to appeal to the Court of Appeals has been denied. Neither upon the trial nor in the appellate courts was any question of jurisdiction raised.

The locus of the crime has never been in dispute. The question of jurisdiction is purely a legal one based upon facts undisputed in the record.

The relator petitioned for a writ of habeas corpus to the United States District Court for the Western District of New York. His petition was there denied upon an opinion of Honorable John Knight, United States District Judge, [fol. 32] filed July 19, 1943, upon the ground, first, that the petitioner could not invoke the jurisdiction of a Federal Court upon a writ of habeas corpus until he should have exhausted his remedies in the State Courts, citing *Jones vs. Dowd,* 128 F. 2nd. 331, and *Mooney vs. Holohan,* 294 U. S. 103. Secondly Judge Knight held that the penal laws of the State of New York governed the acts for which this relator was convicted and that the Supreme Court of the State of New York had jurisdiction to try and convict.

This decision was appealed to the Circuit Court of Appeals where it was affirmed, Judge Jerome Frank writing the opinion of the Court, upon the sole ground that the application was made prematurely since the petitioner had not exhausted his remedies in the State Courts. The majority of the Court refrained from expressing any opinion upon the issue as to whether the State court had jurisdiction, but Judge Clark in an opinion concurred upon the additional and alternative ground that the New York Supreme Court had jurisdiction.

We have here a question which ultimately must be passed upon by the Federal Courts. The statutes we are asked to construe are Federal statutes. Nearly all the authorities cited are decisions of Federal courts, but those Courts seem to be inhibited from deciding the matter unless and until the State courts shall have proven that they "will not or cannot do justice." The result is that the question is presented initially to this Court.

[fol. 33] In attempting to decide the issue before us we are indebted and accord great weight to the opinions expressed by United States District Judge Knight and Judge Clark of the United States Circuit Court of Appeals. The briefs furnished us by the respective counsel are most interesting as examples of research and learning along lines both legal and historical.

The question which we are to attempt to decide, as has been indicated, is whether the penal laws of the State of New York as to a non-Indian charged with murder of another non-Indian, within the confines of the City of Salamanca apply, or whether such a crime is solely within the purview of Federal law.

Chapter II of Title 18 of the U. S. Code provides a complete system of penal statutes as applying to (*Sect. 451, Sub. 3*)

> "lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard or other needful building."

Section 468 adopts by reference the definitions of and punishments for acts not made penal by any act of Congress but defined and punished by the laws of the State in which such lands are located. Such acts in such terri- [fol. 34] tory are, nevertheless, crimes under Federal law and ordinarily to be prosecuted in the Federal Courts.

> *Puerto Rico vs. Shell Co.*, 302 U. S. 263, P. 266, citing *U. S. vs. Press Pub. Co.*, 219 U. S. 1, *Franklin vs. U. S.*, 216 U. S. 559.

Section 452 specifically defines as murder the acts of which this relator was convicted. It is not seriously contended that the City of Salamanca explicitly comes within this or the other subdivisions of said section.

Chapter 6 of Title 25, U. S. Code (the section of the Code relating to Indians) defines and prescribes the punishment for certain crimes committed by white men and by Indians within the Indian country under certain conditions.

Section 217 of said Chapter provides as follows:

> "Except as to the crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

The serious contention made by the relator here is that this section, *217*, extends the provisions of *Section 452 of Chapter II of Title 18 of the Criminal Code* to a murder committed by one white man upon another within the City of Salamanca and that the City is "Indian country" under [fol. 35] the meaning of said *Section 217*. In claiming that

the New York Supreme Court lacks jurisdiction he seems to rely upon certain language in the case of *Ex Parte Crow Dog*, 109 U. S. 556, and similar cases, to the effect that all of the lands in the United States to which the Indian titles have not been extinguished are "Indian lands." He relies particularly upon certain extracts from the opinion of Judge Jerome Frank in *United States vs. Forness*, 125 Fed. 2nd 928.

The Federal Constitution, Article I, Section 8, Clause 3, gives the Congress power

> "to regulate commerce with foreign nations, among the states, and with the Indian tribes."

To an increasing extent both the tribes and the individuals within the tribes have been regarded as the wards of the Federal Government. The power of Congress has been implied to extend as to Indians, to crimes committed by them and against them and also to their dealings with non-Indians, whether within the Eastern states where title was originally in the states or in the Western states where title was originally in the United States.

See

People Ex Rel. Cusick vs. Daley, 212 N. Y. 183.
People Ex Parte Crow Dog vs. The U. S., 109 U. S. 556.
U. S. vs. Kagama, 118 U. S. 375.

See also

U. S. vs. McBratney, 104 U. S. 621 and
Draper vs. U. S., 164 U. S. 240.

[fol. 36] As illustrating the extent to which the Federal Government may impose its authority for the benefit of its wards, the Indians, even in territory adjacent to the reservations where the Indian title has been extinguished, reference is made to the case of *Browning vs. U. S.*, 6 Fed. 2nd 801; certiorari denied, 46 U. S. Supreme Court 25.

It seems clear that if the Congress has intended that the criminal laws of the United States shall extend over non-Indians in the City of Salamanca, its intention must prevail. From the spirit of statute and decisional law such extension would seem to be based less upon whether the title of the Indians to the territory involved may or may not have been completely extinguished, than whether

the interests and welfare of the Indians as wards of the United States are involved.

It is argued that under the language of *Ex Parte Crow Dog*, cited above, and other cases, the term "Indian country" as used in said statute applies to the Seneca Reservation, but the question to be decided here is more strictly limited.

If by the enactment of the Act of Congress of February 19, 1875, *C. 90, 18 Statutes at Large 330*, the Congress intended to permit extension to the villages therein provided for, of the criminal laws of the State of New York, and to remove such villages from the category of "Indian country" then, for that purpose, said *Section 217 and Chapter II of Title 18 of the U. S. Criminal Code* do not apply to non-Indians within the City of Salamanca.
[fol. 37] Said *Act of 1875* is set forth in the annotations to *Section 71 of the Indian Law in McKinney's Consolidated Laws of the State of New York.*

It is evident that following the passage of this Act the surveys provided for were made, defining the limits of the villages, including Salamanca. Leases of a large part of the territory for twelve years, were negotiated in 1880. *Chapter 188 of the Laws of 1881 of the State of New York*, now *Section 71 of the New York State Indian Law*, was passed. Later, the Congress by the *Act of September 30, 1890*, enacted that the leases might be renewed for a further term of ninety-nine years subject to all of the other terms and conditions of said *Act of 1875*. While this did not completely extinguish the Indian titles, it did seem to provide for non-Indian occupancy and control, probably permanent. The City of Salamanca was organized in 1913 and now substantially all of the land in the City is occupied under said ninety-nine year leases, by non-Indians. The New York Legislature passing said *Section 188 of the Laws of 1881* referred to the Act of Congress of 1875, adopted much of the language of that Act but provided that

> "all of the general laws of the state are extended over and apply to the same," (said villages).

Evidently this was the contemporaneous understanding of the New York Legislature as to the effect of the Act of Congress. The Supreme Court of the State of New York, the County Court of the County of Cattaraugus, the Jus-

[fol. 38] tices of the Peace of the Town in which the former Village of Salamanca was located, and since the establishment of the City, the City Court, have all exercised criminal jurisdiction over non-Indians within the City of Salamanca. Over the past period of upwards of sixty years their jurisdiction seems not previously to have been questioned.

The case of *Ex Parte Crow Dog, supra,* is not an authority here; that case involved the murder of an Indian by another Indian on a reservation. The case of *United States vs. Forness* was a suit brought to enforce cancellation of certain leases made by the Seneca Nation upon lands in the City of Salamanca where the lessees had persistently defaulted in paying the rentals. The issue decided by the case is that such controversies between the Indians, who are the peculiar wards of the Federal Government, and lessees of lands in the City leased pursuant to the Act of Congress, are subject to the Federal laws and not to the laws of the State of New York. The crux of the decision is in the words,

> "but state law cannot be invoked to limit the rights in lands granted by the United States to the Indians * * *. State law does not apply to the Indians except so far as the United States has given its consent."

There are certain statements in Judge Frank's opinion which the relator believes are favorable to his contention. These we will refer to later. We believe them to be *obiter dicta.* In the case before us, the murder of a white man [fol. 39] by another white man in a city of white men, no consideration particularly affecting the interests or welfare of the Indians is involved. The sole question is whether the white inhabitants of the City of Salamanca are subject to the State or Federal criminal law and within the jurisdiction of the State or Federal courts. The question seems finally to be determined by the interpretation to be put upon the phrase,

> "and all municipal laws and regulations of said State may extend over and be in force within said villages:".

In interpreting this phrase it seems necessary, at the risk of seeming tedious, to analyze the spirit and purposes of said Act of Congress of 1875.

Section 1 of the Act, validated leases formerly made to railroad companies. These leases we understand had been made by supposed authority of State statutes but had been held unauthorized.

See

Buffalo Railway vs. Lavery, 75 Hun 396.
Ryan vs. Knorr, 19 Hun 540.

Here the State had attempted ineffectually to legislate concerning relations between white men and Indians.

But see

New York Ex. Rel. Cutler vs. Dibble, 62 U. S. 149, and
U. S. Ex Rel. Kennedy vs. Tyler, 269 U. S. 13.

Section 2 authorized the appointment of commissioners to locate proper boundaries for Salamanca and other vil-[fol. 40] lages including as far as practicable

> "all lands now occupied by white settlers and such other lands as in their opinion may be reasonably required for the purposes of such villages."

The villages, then, were to be villages of white men and not Indians.

Section 3, in general provided for the making of twelve year leases (later legislation providing for 99 year leases) to be perpetually renewed as provided in the Section by arbitration between the non-Indian lessees and the Indians as lessors.

Section 4 authorized the Seneca Nation to lease lands not belonging to individual Indians, to make such leases as might be authorized by the resolution of its councilors in accordance with the laws and system of government of the Seneca Nation.

Section 5, provided for recording of the leases in the Office of the Clerk of Cattaraugus County and made them subject to the recording laws of the State of New York. It provided that the rights of the lessees (non-Indians) should pass by assignment, will, descent or otherwise as provided by the laws of the State of New York but that the rights of the Indians in such leases should descend as provided by the laws of the Seneca Nation. This section appropriately makes matters of concern to non-Indians subject to white men's law and matters of concern to Indians only,

subject to Indian law. Potential conflicts between Indian lessors and the lessees involving forfeiture of leases and [fol. 41] the like, are, since the Indians have a degree of sovereignty and are the wards of the Federal Government, *extra-mural* matters, so far as the laws of the State of New York are concerned. Such matters are subject to the laws of the United States.

Matter of Forness, 125 Fed. 2nd 928.

Section 7 of the statute attempts to give jurisdiction both to the courts of the State of New York and to the U. S. Courts, probably as a matter of convenience, as to actions for rents, recovery of real property etc. within the villages. This Section is not inharmonious with the spirit of the whole statute as we interpret it. It perhaps was not then understood that, on account of the Federal guardianship of the Indians, a special body of law might develop as to leases made with them, and their enforcement, other than that prevailing generally in the locality where the lands were situated. The Congress could not have anticipated the *Forness* case, which pioneered the law in this regard some sixty-five years later.

Section 8, recognizes that highways extending through the villages and to other parts of the reservation are matters of concern both to the inhabitants of the village and to the Indians on the reservation outside the village. It provides that all the laws of the State of New York concerning highways and bridges shall apply within the villages and, with the consent of the Seneca Nation and Council, may extend [fol. 42] to and be "in force beyond said villages in said reservations or in either of them."

Hereafter occurs the phrase we have quoted above:

> "; and all municipal laws and regulations of said state may extend over and be in force within said villages; provided nevertheless that nothing in this section shall be construed to authorize the taxation of any Indian or the property of any Indian not a citizen of the United States."

In determining the meaning of the phrase "all municipal laws and regulations of said state," we are permitted to and should consider the purpose and spirit of the entire act in which it occurs. We should ascribe to it a meaning in

harmony with its context, not the meaning which gives it "the least possible sense" in that context.

The learned Assistant Attorney-General in his brief points out that in early texts, more generally read in 1875 than now, the term "municipal law" was often used as referring not merely to the laws relating to municipal corporations but to the laws generally of a state or nation applying to its internal affairs, contra-distinctive to international law or laws having to do with extra-mural matters or relationships. He cites *Blackstone's Commentaries* with notes by T. M. Cooley, 2nd ed., Chicago, 1872; Book 1, Sec. 2, Page 43, as follows:

> "Thus much I thought necessary to premise concerning the law of nature, the revealed law, and the law of [fol. 43] nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities or nations, are governed * * *. 'I call it *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.' Municipal law, thus understood, is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'"

Also *Kent's Commentaries*, 12th edition, edited by O. W. Holmes, Jr. published in 1873, Part III, Page 507:

> "Municipal law is a rule of civil conduct prescribed by the supreme power of a state. * * * Municipal law is composed of written and unwritten, or of statute and common law. Statute law is the express will of the legislature, rendered authentic by certain prescribed forms and solemnities."

Also *Bouvier's Law Dictionary*, 11th ed. Phila. 1862.

> "*Municipal.* Strictly, this word applies only to what belongs to a city. Among the Romans, cities were caller *municipia*; these cities voluntarily joined the Roman republic in relation to their sovereignty only, retaining their laws, their liberties, and their magis-

[fol. 44] trates, who were thence called *municipal magistrates*. With us this word has a more extensive meaning; for example, we call *municipal law*, not the law of a city only, but the law of the state. 1 Bl. Com. Municipal is used in contra-distinction to international; thus we say an offense against the law of nations is an international offense, but one committed against a particular state or separate community, is a municipal offense."

Also "*Lectures Introductory to the Study of Law*," George Sharswood, Philadelphia 1870:

> "*Natural jurisprudence* includes in its survey topics which belong both to Municipal and International Law; that is, both the system of rules which governs a state internally, which we term *Municipal Law*, and that system by which it is regulated in the intercourse and relations with other states, which we call International Law."

Also "*Introduction to American Law*" by Professor Timothy Walker, 6th ed., Boston 1874, Page 47:

> "The grand design of this government would be to unite the people of the *several states* into one nation for *national purposes* only; and accordingly for all *municipal purposes*, each State would still retain its former government, divested, however, of the attributes of complete national sovereignty. * * * Suffice it to say, that each citizen would now owe obedience to two distinct governments, one *national* and the other *municipal* * * *."

[fol. 45] To these citations might be added the third definition of the word "municipal" as given in Webster's International Dictionary, 2nd ed.:

> "3. *Municipal.* Of or pertaining to the internal or governmental affairs of a state, kingdom or nation—used chiefly in the phrase 'municipal law.'"

This view of the meaning of the statute was evidently presented to the Federal Courts in the case of *U. S. vs. Forness*. It seems to us that it should be accorded greater consideration than it received there. In the District Court Judge Knight was of the opinion that the words municipal

laws "were intended to apply only to the State laws for the government and control of villages." If the term were intended to be so limited, it does not seem that the statute is appropriately worded. In their restricted sense "all the municipal laws of the State of New York" would include not only the Village Law but the Town Law, and the County Law, and the General Municipal Law, as well as laws relating to cities and districts of various sorts. Prior to 1874 a great many villages had been set up under special acts of the Legislature. The site of the Village of Salamanca was located within the County of Cattaraugus and also within the boundaries of the Township of Salamanca as well as being part of the Indian reservation.

In the Circuit Court of Appeals Judge Frank dismissed the contention as follows:

> [fol. 46] "When, as in the statute, the 'laws' of a state of the Union are under discussion, there can be no intelligent reference to its international or extra-mural laws for it has none under our Federal Constitution. Appellee's construction would, in effect, read the word 'municipal' out of the statute. 'Municipal laws' of such a state can have but one reference, *i. e.*, the laws of its municipalities. The meaning is the same as when we speak of the 'Municipal Building' of the City of New York."

However, as is stated on *Page 1413 of Volume 42, Corpus Juris*, the adjective "municipal" is

> "more elastic in its meaning, than the word 'municipality' or even than the term 'municipal corporation,' variously defined as, belonging to a city, town or place having the right of local government, belonging to or affecting a particular state or separate community * * *. The term is sometimes used in contra-distinction to 'international' * * *. It has a broader meaning, a more extensive or extended meaning, and is in legal effect the same as public or governmental as distinguished from private."

See also cases there cited.

As to the statement that the State of New York can have no international or extra-mural laws, it would seem that in a sense a state may have and does have laws affected with

an interest outside of the concerns of its own citizens and [fol. 47] even outside its own boundaries. Then, too, the phrase is properly used in contra-distinction to laws of the Federal Government which define relations of the State and its citizens under the Constitution, with other States of the Union and their citizens. We have seen that in 1836 New York State had legislated to authorize Indian leases to railroads, but that the courts had failed to uphold them.

Ryan vs. Knorr, 19 Hun 540.

The statute under consideration, even in its narrower sense, would permit state legislation governing certain relations with the Indians in whom a separate sovereignty is recognized. The statute is legislation which, passed by the State legislature with the consent of Congress, would have an extra-mural significance.

It would seem to us that if the term "all municipal laws and regulations of said state" is to be limited narrowly to mean all of the Village Laws, or even all laws relating only to municipal corporations, the legislation would be inept and ineffectual to accomplish anything but an unworkable and confused result.

The Village Law of 1870 provided for police and police justices within villages. The police justices were vested with the same jurisdiction in civil and criminal matters as justices of the peace. The act further provided that the justices resident in a town where a village was located should have within the village the same civil and criminal jurisdiction which they might exercise outside the village. The question may be asked "What criminal law was it intended [fol. 48] these officers should administer"? Were village police and police justices to administer the village ordinances and the Federal laws? Where would appeals from the decisions of the police justice and the justices of peace be heard? The Town Law gave criminal jurisdiction to Justices of the Peace. The County Law provided for Sheriffs. Federal Law is administered by United States Commissioners and the Federal Courts, and mandates are executed by United States Marshals. Many questions of this sort suggest themselves. It does not seem likely that the Congress could have intended to pass a statute designed to effect legal chaos in the Village or City of Salamanca.

On the other hand it seems that if the broader significance is to be given to the term "all municipal laws and regula-

tions of said State," the statute is understandable and workable. Such meaning seems in harmony with the general purpose and intention of the act. Used in this sense the word "municipal" was most appropriate. If the word "municipal," were to be eliminated, the phrase would be appropriate no longer. It was not, as it seems, intended that *all the laws and regulations of the State* might extend over and be in force in said villages. If the statute had so read it would have been arguable that it authorized other laws, such as had been previously attempted, regulating relations with the Indians. It would have seemed to permit the State to invade a field intended to be reserved to the Federal government as guardian of the Indian tribes.

[fol. 49] If the Congress intended, as we apprehend it did, to pass a statute establishing the villages of non-Indians on the reservation, permitting the laws of the State of New York to govern them so far as their own affairs were concerned, leaving matters purely Indian for regulation according to the institutions and customs of the Indians, but preserving to the Federal government its rights and duties towards its wards the Indians where matters might arise affecting their welfare we can think of no simple phrase which could have been used so aptly as the phrase "municipal laws and regulations," understood in its broader sense.

The fact that in the year 1881 after this Act of Congress was passed and after the surveys had been filed and the leases made, the legislature of the State of New York passed an Act indicating an understanding that the general laws of the State of New York should apply to the villages in question, would seem to be an argument of some weight in favor of the interpretation we are adopting. The facts that for upwards of sixty years the State courts have assumed jurisdiction of criminal matters affecting white people in the City of Salamanca, and that during that period the Federal authorities have disclaimed and down to the present still disclaim jurisdiction, are also arguments that the interpretation suggested was intended by the Congress. As Judge Knight has pointed out, in the construction of a statute of this kind the administrative view is entitled to great weight. He cites *U. S. vs. American Trucking Association*, 310 U. S. 534.

[fol. 50] Where a statute is susceptible of more than one interpretation, contemporaneous and long continued admin-

istrative interpretation of it is especially persuasive. See *annotations 73 U. S. S. C. Law Ed. 322* and *Vol. 84 Law Ed. 28.*

We conclude that the Act of Congress of February 19, 1875, permitted the extension of the penal laws of the State of New York to crimes committed by non-Indians within the City of Salamanca, and that said City is not Indian country within the meaning of *Section 217, Chapter 6 of Title 25 of the U. S. Code.* The Supreme Court of the State of New York had jurisdiction to try and convict the relator and he is held by virtue of a judgment of a court of competent jurisdiction. An order should be entered dismissing the writ and remanding the relator to the custody of the Warden of Attica State Prison.

IN COUNTY COURT OF WYOMING COUNTY

ORDER DENYING WRIT

[Same title]

A writ of habeas corpus having been issued pursuant to the direction of the Hon. Parton Swift of the Supreme Court, on the 10th day of February, 1944, on the petition of Thomas J. McKenna, attorney for Donald A. J. Ray, the relator above named, sworn to the 9th day of February 1944, returnable before the Hon. Barber B. Conable, County Judge of the County of Wyoming at the Courthouse at Warsaw, New York, on the 21st day of February, 1944 at 2:00 o'clock in the afternoon, and a return sworn to the 15th day of [fol. 51] February, 1944 having been filed by the respondent herein, and the record on appeal in the United States Circuit Court of Appeals for the Second Circuit in the case of United States of America, on the relation of Donald A. J. Ray, Relator-Appellant, vs. Dr. Walter Martin, Warden of Attica State Prison, Respondent-Appellee, having been submitted and the affidavit of Charles E. Congdon, sworn to the 24th day of April, 1943, contained therein, having been received in evidence, and the matter having come on to be heard before me, and after hearing Thomas J. McKenna, Esq., attorney for the relator, in favor of sustaining said writ, and Nathaniel L. Goldstein, Attorney-General of the State of New York, by Wortley B. Paul and

Henry S. Manley, Assistant Attorney-General, for the respondent herein, and Beverly S. Galloway, Assistant District Attorney of Cattaraugus County, all in opposition thereto, and the relator, Donald A. J. Ray, having been produced by the respondent and having been present upon the return day of the writ, as aforesaid and due deliberation having been had, and it appearing that the relator is held pursuant to a judgment of a court of competent criminal jurisdiction, and upon my opinion herein dated April 11, 1944, it is

Ordered that the said writ of habeas corpus be, and the same hereby is, dismissed, and that the relator be, and he hereby is, remanded to the custody of the Warden of Attica State Prison, Attica, New York.

Barber B. Conable, County Judge of Wyoming County.

[fol. 52] Clerk's Certificate to foregoing paper omitted in printing.

IN COUNTY COURT OF WYOMING COUNTY

STIPULATION AND WAIVER

[Same title]

STATE OF NEW YORK,
County of Wyoming, ss.:

It is hereby stipulated by and between the attorneys for the respective parties to this proceeding pursuant to Section 170 of the Civil Practice Act that the foregoing copies are true and correct copies of the judgment roll and proceedings before the Honorable Barber B. Conable, notice of appeal, original petition and writ of habeas corpus, original writ, [fols. 53-54] record on appeal, United States Circuit Court of Appeals, Ray vs. Warden, which contained affidavit of Charles E. Congdon and which affidavit, it was stipulated at the hearing of this proceeding was to be made part of the return in this proceeding, opinion of the Honorable Barber B. Conable, and the order denying the writ, as filed in the office of the clerk of the County of Wyoming, and that the

appeal in this case be heard on said papers without certification thereof, which is hereby waived.

Dated: Buffalo, New York, April —, 1944.

Thomas J. McKenna, Attorney for Relator-Appellant; Nathaniel L. Goldstein, Attorney General of State of New York; Wortley B. Paul and Henry S. Manley, Assistant Attorneys-General; Beverly S. Galloway, Esq., Assistant District Attorney of Cattaraugus County.

In County Court of Wyoming County

Order of Settlement

[Same title]

I do hereby certify that the foregoing case and exceptions contains all the pleadings and exhibits before me upon the hearing of the writ of habeas corpus, as more fully appears by the stipulation of the attorneys hereto.

Dated, April —, 1944.

Barber B. Conable, County Judge of Wyoming County.

[fol. 55] In Supreme Court of New York, Appellate Division, Fourth Department

Present: Hon. Benjamin B. Cunningham, Presiding Justice; Hon. Marsh N. Taylor, Hon. William F. Bowling, Hon. Samuel J. Harris, Hon. Francis D. McCurn, Associate Justices.

The People of the State of New York, ex Rel. Donald A. J. Ray, Appellant,

vs.

Walter B. Martin, as Warden of Attica State Prison, Attica, New York, Respondent

Order of Affirmance

The above named Donald A. J. Ray, petitioner in this proceeding, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from an order of

the Wyoming County Court, entered in the office of the Clerk of the County of Wyoming, on the 22nd day of April, 1944, and the said appeal having been argued by Mr. Thomas J. McKenna, of counsel for the appellant, and by Mr. Henry [fol. 56] S. Manley, and Mr. Beverly S. Galloway, of counsel for the respondent, and due deliberation having been had thereon

It is hereby Ordered, that the order so appealed from be, and the same hereby is, affirmed without costs of this appeal to either party.

Opinion by Cunningham, P. J.

All concur.

Enter, B. B. Cunningham. Entered 27th day of September, 1944. Herbert E. Wait, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 57] In Supreme Court of New York, Appellate Division, Fourth Department

Opinion

Cunningham, P. J.:

The relator was indicted by a grand jury of Cattaraugus County for the crime of murder in the first degree. One of the counts of the indictment charged that the murder was committed by the defendant while he was in the act of committing a felony. It was upon this count that the defendant was found guilty by a jury after a trial in the Supreme Court of Cattaraugus County. The jury recommended life imprisonment and, thereafter on December 15, 1939 the defendant was sentenced to be confined in Attica State Prison for the term of his natural life.

The conviction of relator was appealed to this court and was affirmed. The question of jurisdiction was not raised upon the trial or upon the appeal to this court. After the sentence the relator applied to the United States District Court for a writ of habeas corpus. This was denied by Judge Knight, United States District Judge, upon the ground that such writ could not be allowed until relator had

exhausted his remedy in the state courts and upon the further ground that the Supreme Court of the State of New York had jurisdiction to try and convict him. Upon appeal to the Circuit Court of Appeals, Judge Knight's decision was affirmed upon the ground that the relator was not entitled to a writ until it became apparent that the state courts would not or could not do justice. The question of the jurisdiction of the State Supreme Court was not passed upon. Application was then made to a state court—the County [fol. 58] Court of Wyoming County—for a writ of habeas corpus, the relator claiming that the crime was committed on Indian lands; that the state courts did not have jurisdiction to try him for such crime and that his trial should have been had in a federal court. The appeal now pending before us was taken from the order of the Wyoming County Court which denied such application.

The relator is a white man and the murdered man was a white man.

It is conceded that the place where the crime is alleged to have been committed is in the City of Salamanca, which is within the original limits of Allegany Indian Reservation.

The relator relies upon Section 217, Title 25, U. S. C., reading as follows:

> "Except as to crimes punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

The lands in the City of Salamanca are mostly occupied by white people, but the Indians still hold the title to them. However, the Indians have been permitted by act of Congress to lease the lands now included in the City of Salamanca to the people who now occupy them for a term of ninety-nine years, with the right of renewal given to each lessee. (City [fol. 59] of Salamanca v. United States, 125 Fed. (2d) 928; Certiorari denied 316 U. S. 694). The Indians have parted with their right to use and occupy the lands in the City of Salamanca and have passed the control thereof to the lessees.

Lands which are used and occupied by white persons under a grant of the Indian owners are not, in our opinion,

Indian lands within the meaning of the statute relating to Indian lands. The term "Indian Lands" applies only to lands owned by Indians and occupied and used by them. (United States v. Chavez, 290 U. S. 357).

In the early days of this country the various Indian tribes were regarded as foreign nations, and regulations for their welfare and protection and for the protection of their property were made through treaties negotiated between each tribe and the United States. In subsequent years the theory that each Indian tribe was a foreign nation was discarded and the Indians were regarded as wards of the United States, and protection to them and their property was given by acts of Congress and they became subject to the regulations contained in such acts.

For many years this state has held in decisions of its courts and in laws enacted by its Legislature that it had jurisdiction to try Indians for crimes committed against other Indians or their property whether on Indian lands or on other lands in the state. As late as July 1913, the Ap- [fol. 60] pellate Division of this department unanimously affirmed an order of the Supreme Court of Niagara County, holding that the Supreme Court of this state had jurisdiction to try an Indian for a crime committed upon the person of another Indian within the boundary of the reservation on which both lived. (People *ex rel.* Cusick v. Daly, 78 Misc. 657; Affd. 158 App. Div. 892). However, this decision was reversed by the Court of Appeals which held that the power of the state must yield to the paramount authority of the federal government and that under the statutes of the United States the power to try the defendant in that case was vested in the federal courts. (People *ex rel.* Cusick v. Daly, 212 N. Y. 183). This decision does not apply in the case at bar because the jurisdictional facts in the cited case and in this case are entirely different. In the cited case the crime was committed upon an Indian reservation the lands of which were owned by an Indian tribe and were used and occupied by Indians. Furthermore, the crime was committed by an Indian upon the person of another Indian, both of whom were wards of the United States. In the case under consideration the crime was not committed upon lands used and occupied by Indians and was committed by a white man upon the person of another white man.

We believe that the section of the United States statutes relied upon by the relator does not apply to a crime com-

mitted by one white person against another. This statute [fol. 61] was passed to provide for the punishment of crimes committed by Indians on Indian lands and applies to crimes committed by white persons on Indian lands against Indians or their property, but does not apply to a crime committed by a white person against another white person even though committed on Indian lands. The federal courts do not have jurisdiction to try white citizens of the various states for crimes not committed against the federal government or against the wards of the federal government. This is so even though the crime is committed on Indian lands. (United States v. McBratney, 104 U. S. 621; United States v. Bailey, 1 McLean 234).

The order appealed from should be affirmed, without costs.

IN COUNTY COURT OF WYOMING COUNTY

[Same title]

ORDER PURSUANT TO ORDER OF APPELLATE DIVISION AND NOTICE OF ENTRY

An appeal having been heretofore taken from an Order of this Court filed in the Office of the Clerk of the County of Wyoming on the 22nd day of April, 1944, dismissing a Writ of Habeas Corpus and said appeal having been heretofore argued before the Appellate Division of the Supreme Court, Fourth Department and an Order having been entered on the 27th day of September, 1944 by that Court [fol. 62] affirming the Order of the County Court of Wyoming County, and a copy of the Order of the said Appellate Division of the Supreme Court, Fourth Department having been heretofore filed in the Office of the Clerk of the County of Wyoming, a copy of which order is hereto annexed,

Now, on motion of Thomas J. McKenna, attorney for the relator, it is hereby

Ordered, that the Order of the Appellate Division of the Supreme Court, Fourth Department, affirming the Order of this Court is hereby made an order of this Court.

Dated: October 13, 1944.

Barber B. Conable, County Judge, Wyoming County.

SIR:

Take notice of an Order of which the within is a copy, duly granted in the within entitled action, on the 13th day of

October, 1944, and duly entered in the office of the Clerk of the County of Wyoming on the 13th day of October, 1944.

Dated: Buffalo, N. Y., October 14, 1944.

Thomas J. McKenna, Attorney for Relator, Office & P. O. Address, 706 Morgan Building, Buffalo 2, New York.

[fol. 63] In Supreme Court of New York, Appellate Division, Fourth Department

Present: Hon. Benjamin B. Cunningham, Presiding Justice; Hon. Marsh N. Taylor, Hon. William F. Dowling, Hon. Samuel J. Harris, Hon. Francis D. McCurn, Associate Justices.

[Same title]

Order Denying Motion for Reargument and Leave to Appeal to the Court of Appeals

The above named Donald A. J. Ray, appellant herein, having, on the 24th day of October, 1944, duly moved before this Court for an order granting to him a reargument of the appeal herein or in the alternative leave to appeal to the Court of Appeals from the order of affirmance heretofore and on the 27th day of September, 1944, duly made and entered herein by this Court,

Now, after reading and filing the affidavit of Thomas J. McKenna, verified the 16th day of October, 1944, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, and upon all the proceedings heretofore had and taken herein, after hearing Mr. Thomas J. McKenna, of counsel for appellant, in favor of said motion, and Mr. Nathaniel L. Goldstein, of counsel [fol. 64] for respondent, in opposition thereto, and due deliberation having been had thereon,

It is hereby Ordered, That the motion for reargument be, and the same hereby is, denied, and that the motion for leave to appeal to the Court of Appeals be, and the same hereby is, denied.

Enter, B. B. Cunningham.

Entered 1st day of November, 1944.
Herbert E. Wait, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 65] IN COURT OF APPEALS OF NEW YORK

Present: Hon. Irving Lehman, Chief Judge, Presiding.

[Same title]

ORDER GRANTING MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS—November 30, 1944

A Motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the relator-appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A Copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 66] IN COUNTY COURT OF WYOMING COUNTY

[Same title]

NOTICE OF APPEAL FROM JUDGMENT PURSUANT TO LEAVE OF COURT OF APPEALS

SIRS:

Please Take Notice that, pursuant to leave granted by the court of appeals of the state of New York in the above entitled action, by an order duly made and filed in the office of the clerk of that court on the 30th day of November, 1944, the above named relator-appellant hereby appeals to the court of appeals from the judgment of affirmance herein entered in the office of the clerk of the county of Wyoming on the 13th day of October, 1944, pursuant to the order of the said appellate division, duly entered herein, and which judgment in all things unanimously affirmed the judgment of the County Court, Wyoming County, entered herein on the 22nd day of April, 1944, and this appeal is from each and every part of said judgment.

Dated: Buffalo, New York, December 6, 1944.

Yours, etc., Thomas J. McKenna, Attorney for Relator-Appellant, Office & P. O. Address, 706 Morgan Building, Buffalo 2, New York.

[fol. 67] To: Nathaniel L. Goldstein, Attorney General of State of New York; Wortley B. Paul and Henry S. Manley, Assistant Attorneys-General, appearing for the State of New York and the Warden of Attica State Prison, State Office Building, Albany, New York; Beverly S. Galloway, Esq., Assistant District Attorney of Cattaraugus County, Office & P. O. Address, 514 Exchange National Bank, Olean, New York; Maurice F. Martin, County Clerk, County of Wyoming.

In County Court of Wyoming County

Stipulation and Waiver

[Same title]

It Is Hereby Stipulated by and between the parties hereto or their respective attorneys, pursuant to Section 170 of the Civil Practice Act, that the foregoing copies are true and correct copies of the judgment roll, the order of the Appellate Division, notice of appeal and the judgment of the Appellate Division as filed in the office of the clerk of the County of Wyoming and of the whole thereof, and [fol. 68] that the appeal in this case be heard on said papers without certification thereof, which is hereby waived.

Dated: Buffalo, New York, December 9, 1944.

Thomas J. McKenna, Attorney for Appellant-Plaintiff. Nathaniel L. Goldstein, Attorney General of State of New York. Wortley B. Paul and Henry S. Manley, Assistant Attorneys-General, appearing for the State of New York, and the Warden of Attica State Prison. Beverly S. Galloway, Esq., Assistant District Attorney of Cattaraugus County.

[fol. 69] IN THE COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. DONALD A. J. RAY, Appellant,

against

WALTER B. MARTIN, as Warden of Attica State Prison, Respondent

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 27, 1944, which unanimously affirmed an order of the Wyoming County Court (Conable, J., opinion 181 Misc. 925) dismissing a writ of habeas corpus and remanding relator to the custody of respondent, as warden of Attica State Prison.

Thomas J. McKenna, James B. McKenna and Benjamin Galperin for appellant.

Nathaniel L. Goldstein, Attorney-General (Henry S. Manley, Orrin G. Judd and Wortley B. Paul of counsel), for respondent.

Beverly S. Galloway, Assistant District Attorney, Cattaraugus County.

OPINION—March 1, 1945

DESMOND, J.:

Relator is serving, in a New York State Prison, a life sentence imposed on him by the Supreme Court of the State of New York on December 15, 1939, for the commission, at the City of Salamanca, in Cattaraugus County, New York, of a "felony murder" (Penal Law, Sec. 1044, Subd. 2, Sec. 1045-a). Almost the whole of the City of Salamanca, including the scene of the killing, is within the bounds of the Allegany Reservation of the Seneca Nation of Indians. Relator is not an Indian, nor was his victim, one Paul Balsiger. In this habeas corpus proceeding relator asserts that the Supreme Court of this State was without any jurisdiction of his offense, committed as it was on an Indian reservation. No such challenge to the juris- [fol. 70] diction was made during relator's trial or on his appeal to the Appellate Division from the judgment of conviction, which appeal resulted in an affirmance by that

court (259 App. Div. 1065), or on a subsequent motion, denied by a Judge of this court, for leave to appeal to this Court. We hold, nonetheless, that the alleged jurisdictional question may properly be raised by these habeas corpus proceedings. (See People ex rel. Carr v. Martin, 286 N. Y. 27, 31, 32.) Special Term and the Appellate Division, fourth department, both wrote opinions (181 Misc. 925 and 268 App. Div. 218) in dismissing the writ. We granted leave so that we might, if possible, set at rest any doubts as to whether the Penal Laws of this State apply to crimes committed in the city of Salamanca. The respective counsel have furnished us with extensive reviews of the writings on the very large subject of the jurisdiction of tribal, Federal and State courts over Indian reservations in the United States. We content ourselves with a statement of the bases for our conclusion that relator was properly indicted, tried and punished in the Supreme Court, despite the undoubted fact that the crime was committed on lands which form part of an Indian reservation. In general, our reasons for that conclusion are these: that there is no basis in any treaty, Constitution or statute for an assertion by the Federal government of exclusive jurisdiction over crimes committed by non-Indians against non-Indians on this reservation, that such jurisdiction has historically, by common consent and for sound legal reasons been assumed to exist, by the Federal and State courts in New York and elsewhere, that this is peculiarly so as to the reservations of the "Six Nations" in New York State, and, finally, that there is a Federal statute making applicable to the city of Salamanca the general laws of the State of New York.

The Allegany reservation of the Seneca Indians is wholly within New York State, has an area of about forty-two [fol. 71] square miles and extends along both sides of the Allegany River, north from the Pennsylvania border. It is a part of the much more extensive lands occupied by the Seneca nation before the American Revolution. Before our Federal Constitution was adopted, those Seneca lands were within the bounds of the State of New York. The Allegany reservation was, accordingly, not created by the Federal government out of United States government lands within the State, and was never at any time territory of the United States. (Seneca v. Christie, 126 N. Y. 122, 136, affd. 162 U. S. 283.) During colonial days there had been

a protracted quarrel between New York and Massachusetts over a large territory (several millions acres) including much of present-day western New York, each colony claiming that its royal charter gave it sovereignty and jurisdiction over the disputed tract. In 1786, after the Declaration of Independence but before the adoption of the Federal Constitution, a compact was entered into between the sovereign States of Massachusetts and New York by the terms of which compact New York was recognized as having sovereignty and jurisdiction over the lands and Massachusetts was recognized as the owner of the "right of preemption" of the lands themselves, including the right to extinguish such title as the Indians had. This compact, subsequently ratified by the Congress of the United States, authorized Massachusetts to grant and convey the right of pre-emption, as to any part of the lands involved, "to any person or persons, who by virtue of such grant, shall have good right to extinguish by purchase the claims of the native Indians * * *". Massachusetts in 1791 conveyed its title, subject to the Indian claims, to Robert Morris, who later conveyed it to the Holland Land Company, Morris agreeing to extinguish the Indian rights at his own expense. He did so in 1797 when at a great council of the Senecas held at Geneva, New York, he received from the Seneca Nation a conveyance of all the lands [fol. 72] purchased by him from the State of Massachusetts, excepting certain Indian reservations, including the Allegany reservation with which we are here concerned. The council was held and the conveyance made with the approval of the government of the United States, as represented by its Commissioner. (See discussions of these transactions in Seneca v. Christie, supra, and Jemison v. Bell, 186 N. Y. 493, 497.)

Previously to the Geneva Council, and in 1794, there had been entered into at Kon-on-daigua (Canandaigua, N. Y.) a treaty between the United States of America and "the Tribes of Indians called the Six Nations" (including the Seneca Nation). By it "peace and friendship" were to be "firmly established" forever, between the United States and the Six Nations. The treaty contains a description by metes and bounds of the lands of the Seneca nation, with an acknowledgement by the United States that the described lands were the property of that nation, and a promise by our government that the possession thereof by the Senecas

would never be disturbed. The Senecas, on their part, covenanted that they would never claim any other lands within the boundaries of the United States. By Article V the Senecas ceded to the United States the right to build a wagon road through part of their lands (not the Allegany reservation) and the right of free passage through all the Seneca lands. Article VII of that Treaty of 1794 is one of relator's main reliances. By that article it was stipulated that, "lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, * * * for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured to the other". If the depredation was by Indians, the complaint was to be made by the President, or a superintendent by him appointed, to the principal chiefs of the Six Nations [fol. 73] or any of them; if the "private injury" was by whites, then the complaint would go from the Indian nation to the President, or his superintendent. Upon the entry of any such complaint, says article VII, "such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken until the legislature (or great council) of the United States shall make equitable provision for the purpose". Relator treats that last-quoted sentence as "provision for future federal legislation which would cover the crime in question when committed within the Allegany reservation". He says that the language "expressly excluded State laws from application to this reservation". We cannot agree that it had any such meaning or effect, or that it referred at all to the question of what system of internal law should thereafter operate within the tribal lands. The treaty was, in substance as well as form, a true treaty, made between the United States of America and the quasi-sovereign Six Nations. It was made not to set off lands to the Indians or to provide for their government, but as a treaty of peace to put an end to a state of war and guard against its recurrence. For this purpose, border raids or other incursions were to be treated as "international incidents", and diplomatic representations thereupon were to be made by the aggrieved signatory to the other. The Treaty of 1794 was one of a long series of actual treaties made between the United States and Indian tribes until the practice was abolished in 1871. (See Seneca v. Christie, supra; Turner v. American Baptist etc., 5 McLean

344, 349; United States v. Whiskey, 93 U. S. 188.) It did not create any Indian reservation but confirmed the Senecas' aboriginal right of possession. (See United States v. Santa Fe, 314 U. S. 339.) Nothing in the language of the pact, the circumstances giving rise to it, or the history of proceedings under it, furnish reason for holding that it had anything to do with the future domestic government of [fol. 74] the reservation or that the reference to "the legislature or great council of the United States" in itself conferred on Congress any power of any sort to legislate as to such matters. If such a meaning had been intended, appropriate language was available. (See, for instance, treaty provision quoted in United States v. 43 Gallons whiskey, supra, 93 U. S. at p. 193.)

Of course, Congress had, from other sources, jurisdiction over the Indians and their lands and their affairs. By Federal Constitution provision (art. 1, Sec. 8) and perhaps ex necessitate (See Board v. Saber, 318 U. S. 705, 715), the Indian tribes have always been to some degree dependents of the government of the United States and their members have been wards of that government, receiving its care and protection. (United States v. Kagama, 118 U. S. 375; United States v. Sandoval, 231 U. S. 28; United States v. Klamath, 304 U. S. 119.) The power of Congress over the Indians and their tribal affairs and domains is paramount and of a most sweeping character. (Worcester v. Georgia, 31 U. S. 515.) The courts of this State, as well as the Federal courts, have consistently recognized that this paramount power in Congress is applicable to the affairs of the Six Nations within New York State. (People ex rel. Cusick v. Daly, 212 N. Y. 183, 196; Mulkins v. Snow, 232 N. Y. 47, 51; United States ex rel. Kennedy v. Tyler, 241 U. S. 556, affg. 294 F. 111.) But, while the tribal Indians, being wards of the national government, are not generally amenable to State laws nevertheless the lands in any State occupied by Indians is still part of the State unless expressly excluded therefrom. (See Thomas v. Gay, 169 U. S. 264, 274, 275; Utah v. Fisher, 116 U. S. 28.) The exclusive control of the Federal government over Indians extends only so far as is required by the pupilage of the wards and has to do only with government and protection of the Indians themselves. (Utah v. Fisher, supra.) Congress may exercise that jurisdiction by legislating concerning crimes committed [fol. 75] by Indians or against Indians within a reservation.

(Donnelly v. United States, 228 U. S. 243.) But that jurisdiction over the Indians has nothing at all to do with the transactions of white men among themselves not affecting the persons or property of Indians, on or off a reservation. Accordingly, it has been held in many State and Federal decisions, and apparently never until now questioned, that to oust the criminal courts of a State from jurisdiction over crimes committed by a non-Indian against a non-Indian, more must be shown than the single fact that the crime was committed on an Indian reservation. (See Donnelly v. United States, supra; United States v. McBratney, 104 U. S. 621; State v. Monroe, 83 Mont. 556; People v. Pratt, 26 Cal. App. 2d 618; State v. Lindsay, 133 Wash. 140; State v. Adams, 213 N. C. 243; United States v. Partelle, 48 F. 670.) To allocate jurisdiction over such crimes to the Federal courts, there must be shown some treaty or act specifically so commanding. (United States v. Partelle, supra; see Draper v. United States, 164 U. S. 420.) The reason is simply this: the original thirteen states and those later admitted into the Union on an equal basis with the original thirteen, have general criminal jurisdiction over all non-Indian persons within the State limits, including Indian reservations. (United States v. McBratney, supra.) Even as to Indians, the national government's exclusive jurisdiction of the crimes over which it has by statute assumed jurisdiction, applies only to Indians living "in the tribal relations" (Peters' case, 2 Johns. Cases 344; People ex rel. Cusick v. Daly, supra, 212 N. Y. at p. 193.) It is a jurisdiction stemming from the power to legislate in "Indian affairs" and not embracing all occurrences on Indian lands. The case of the New York Indians (5 Wall. 761), is not to the contrary; it forbade State taxation of tribal lands on this reservation because such taxation would be "offensive to the tribal relations" (p. 771). Cases like [fol. 76] Pickett v. United States (216 U. S. 456), merely show that in the later-admitted states the Federal government may, and sometimes did, in granting statehood, or in creating Indian reservations out of lands owned by the United States, expressly reserve exclusive jurisdiction on such Indian lands, as to all justiciable matters. No such situation has ever existed in New York State. In 1834, Supreme Court Justice McLean held at Circuit (United States v. Bailey, 1 McLean 234) that a United States Court could not try a white man for killing another white man on a

Cherokee reservation. "The State of New York" he noted (p. 239) "for many years has punished its citizens for crimes committed in the Indian territory within its limits".

Assuming that Congress could by statute take or keep for itself exclusive legislative control over the crime of murder, by whomever perpetrated, in the Allegany reservation, where is there any such statute? Relator relies on United States Code, Title 18, Sections 451 and 452 and United States Code, Title 25, Section 217. The first two of those sections (U. S. Code, Title 18, Sections 451, 452), so far as important here, define, and provide for the punishment of murders "committed within or on any lands * * * under the exclusive jurisdiction (of the United States)". We find no ground whatever for a holding that the Allegany reservation was ever "under the exclusive jurisdiction" of our Federal government. Ultimately, relator's opposing argument stands or falls on his own construction of the Treaty of 1794, a construction which we have rejected in preceding paragraphs of this opinion and which has never in practice been accepted by any branch of either the New York State or the United States Government. In the other statute (U. S. Code, Title 25, Section 217) urged upon us by relator as empowering the United States Courts alone to deal with murders done on reservations, the language is that, with exceptions not here relevant, "the general laws [fol. 77] of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States * * * shall extend to the Indian country." Relator says that the Allegany reservation, including the City of Salamanca, is "Indian country." Without passing squarely on the point, we conclude that there is some basis for it. "Indian Country", archaic as the phrase now sounds, still seems to comprehend any unceded land, such as a reservation, occupied by an Indian tribe—any place to which the Indian title has not been extinguished. (Donnelly v. United States, supra; Bates v. Clark, 95 U. S. 204; ex parte Crow Dog, 109 U. S. 556; Pronovost v. United States, 232 U. S. 487; United States v. Pelican, 232 U. S. 442; United States v. Chavez, 290 U. S. 357.) We may doubt whether the phrase "Indian country" ever did have any meaning in connection with the Six Nations and more doubt as to whether it could, in any event, be reasonably applied to Salamanca, in which live only a handful of Indians and which is, by State statute and Act of

Congress (as we shall see hereafter) a white man's city. Only by main force, we think, could the term be applied to a city all of the lands of which have, by corporate action of the Seneca Nation and with the express consent of Congress (see later discussion of the Act of 1875) been leased to white persons. "A country without Indians could hardly be considered an Indian country" (United States v. Richard, 1 Ariz. 31, 39, 40). But, whether or not Salamanca is still "Indian country" in some sense or other, we state with confidence that the particular statutes cited by relator have never been considered as giving the Federal courts absolutely exclusive jurisdiction of crimes, whether committed by Indians or Whites, on the New York State reservations. In Benson v. United States (44 F. 178), the Circuit Court, reversing a conviction, held that Benson, operating a tavern in Salamanca, was not guilty of introducing intoxicating liquors into the "Indian country" (see U. S. Code, Title [fol. 78] 25, Section 241.)

In Mullins v. Snow (232 N. Y. 47, 50, 51), this court recognized, but did not define the limits of, the power of the State to legislate even in some respects "for the tribal Indians living on reservations" and referred to power of Congress as being one "to legislate for them (the Indians) within their reservation." The Supreme Court, in State v. Dibble (62 U. S. 149), referring to a New York State statute relating to intrusions of white men on Indians lands, and speaking specifically of the Tonawanda reservation of the Senecas, said: "Notwithstanding the peculiar relation which these Indians hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as was necessary to preserve the peace of the commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered." It would take too long to list the various assumptions by New York State of various kinds of control over the Indians themselves, and the ratifications and recognitions thereof by the Federal government and courts. (See United States ex rel. Kennedy v. Tyler, supra.) Justice Andrews, later of this court, wrote in a memorable opinion (George v. Pierce, 85 Misc. 105, 122): "Our Courts have assumed criminal jurisdiction over them (the Six Na-

tions). Our legislature has asserted their right so to do. And this jurisdiction has been mentioned by the Supreme Court of the United States without disapproval." Justice Andrews, recalling that the Indians of the Six Nations were in fact wards of this State at the time it became an independent sovereignty on the adoption of the Declaration of Independence and that among other sovereign rights of the State, as successor to the British Crown before the adoption of the Constitution, was its protectorate over the [fol. 79] Indian tribes, pointed out that New York never transferred to the general government any rights over the Indians except as expressed in the Federal Constitution, and that, in a broad sense, the Indians of the Six Nations are, unlike the Western Indians "wards of the State—not of the United States" (85 Misc. at p. 120). From all of this, it is plain enough, we think, that the doubts and vagueness that becloud the general subject of law on Indian reservations, have nothing whatever to do with criminal prosecutions like that of this relator for the killing of Paul Balsiger, in Salamanca, New York, in 1939.

In an earlier paragraph of this opinion we stated, as one of the bases for our conclusion herein, that there is a Federal statute which makes applicable to the city of Salamanca, the general laws of the State of New York. That enactment (U. S. Code, Title 18, Stat. 330 Ch. 90) was passed by Congress in 1875. It provides as to Salamanca (then a village) and several other named villages in the Allegany reservation that "all municipal laws and regulations of said State (New York) may extend over and be in force within said villages." From the historical background of the statute, the setting of the quoted language therein, and from subsequent authoritative interpretation given it by the New York Legislature, it is plain to us that "all municipal laws and regulations of said State" means all the internal, domestic laws of the State. Our arrival at that conclusion has not been a hasty or incautious one, conscious as we are that the United States Circuit Court of Appeals has, in United States v. Forness (125 F. 2d 928, cert. den. 316 U. S. 694) interpreted somewhat differently the phrase of the statute: "municipal laws." As always, we give due and great respect to the construction by a Federal court of a Federal statute, but we are not strictly bound in such matters by any but United States Supreme Court decisions. In this instance we feel constrained to

[fol. 80] make our own independent decision. We are called upon in this case to decide whether or not there exists any legal basis for the undisputed enforcement in Salamanca, for the past sixty-five years or more, of the general penal laws of this State. The Circuit Court of Appeals did not have any such broad question before it in the Forness case. The Forness case was brought on behalf of the Seneca Nation, in ejectment, to oust one of the white lessees for nonpayment of the rent due from him to the Nation. One of the issues before the Circuit Court was as to the applicability to such a lawsuit between the tribe and a white individual, of sections 997-999 of the New York Civil Practice Act, particularly section 999 which permits payment into court, at any time before judgment, of the rent due, with costs, and requires a dismissal of the action, on such payments being made. Whatever the words "municipal law" may mean in the case we have before us on this appeal, or in other connections, it is entirely clear that Congress, validating the Indian leases and reserving a measure of Federal control over the leased lands, could not have intended by the 1875 statute to make applicable to controversies over those leases the New York laws as to remedies of the lessor on a default by the lessee. As the Special Term said in the present case, interpreting section 5 of the 1875 statute: "Potential conflicts between Indian lessors and the lessees involving forfeiture of leases and the like, are since the Indians have a degree of sovereignty and are the wards of the Federal government; extra-mural matters, so far as the laws of the United States are concerned. Such matters are subject to the laws of the United States."

We agree with the Circuit Court of Appeals that "municipal laws" has two meanings. Broadly and classically it means the laws pertaining to the internal government of a State or nation. (See 1 Blackstone Comm. 44; People v. Tiphaine, 3 Parker Cr. Rep. 244.) In its more modern and narrower connotation it means those laws which pertain to towns, cities and villages and their local govern- [fol. 81] ments. Intrinsically the words may have either of those meanings. But historical research, we believe, establishes that the broader and older intendment must have been the one used by Congress. The statute was passed because of a pressing difficulty. Long before 1875, Salamanca and several other villages of white men had

sprung up on the Allegany reservation, and the white settlers and several railroad companies who built their lines through the reservation lands, had made their improvements on the faith of land leasses from the Indians. Although confirmed by act of the New York Legislature of this State passed and transmitted to Congress a resolution (L. 1875, p. 819) requesting the latter body to pass some law "for the relief of said white settlers." Soon thereafter, Congress on February 19, 1875, enacted the law we are here construing. After providing for appropriate validation of the leases, the statute in its last paragraphs, says this: "That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages (including Salamanca), and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: Provided, nevertheless, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States." The best possible clue to the meaning of "all municipal laws and regulations of the State" as used in the Act is found in the action taken by our State Legislature, after Congress had acceded to its request by passing the statute above described. Apparently the new leases authorized by the Federal Act were entered into in 1880. In 1881, our Legislature, undoubtedly as a sequel to that passage of the Federal Act, put on our statute books chap- [fol. 82] ter 881 of the Laws of that year, now section 71 of our State Indian Law, wherein, changing the word "municipal" to "general" it directed that "all the general laws of the state are extended over and apply to the same (the villages of Salamanca et al)". From that day until the Forness case (supra) was decided, no one has ever expressed a doubt, as far as any record shows, that the word "municipal" as used by Congress and the word "general," as used by our Legislature, meant exactly the same thing, and that both words included and envisaged the whole State system of laws for the internal government of the residents of the village, and not merely minor local ordinances, or State laws dealing with the details of village government. Such a use of the phrase "municipal

law" was technically and scientifically correct for the result intended. The Act of 1875 was an act of cession in the sense that it ceded to the State such governmental jurisdiction as the national government or the Seneca Nation might otherwise have or been thought to have, over the white villages. (Incidentally such cessions or relinquishments of Federal control over the government of Indian lands are not unusual and are considered legal even in contravention of treaties. (See Lone Wolf v. Hitchcock, 187 U. S. 553, 566, 567; Tiger v. Western, 221 U. S. 286, 315; Shoshone v. United States, 299 U. S. 476, 497). To describe the body of law which was to be operative in such ceded territory, the phrase "municipal laws" was appropriate and conventional. In Chicago v. Pacific Railroad Co. (1885) (114 U. S. 542), the Supreme Court was called upon to decide whether a State statute remained in effect on the Fort Leavenworth Military Reservation after the State of Kansas had ceded to the United States exclusive jurisdiction therein. A quotation from that opinion (p. 546) will show better than extended argument *now* apt and necessary was the phrase "municipal laws" to convey [fol. 83] the idea that in the Village of Salamanca, private property and private conduct were to be regulated by the laws of the State of New York: "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign". (For similar uses of the word "municipal" see Halleck. Int. Law (1st ed., 1861), ch. 33, Sec. 14; Vilas v. Manila, 220 U. S. 345, 347; Murray v. Gerrick, 291 U. S. 315, 319.) Thus we see that the clause "all municipal laws and regulations of said State may extend over and be in force within said villages" was a short but scientifically complete way of eliminating any doubt as to whether, after the Act's passage, the laws affecting private rights of the residents of the villages would be those of the United States, or the Seneca Indians, or the State of New York. The Circuit Court of Appeals thought that giving "municipal laws" its more ancient meaning, i. e., of general State laws as opposed to international laws, would result in an absurdity since, said that court, the

State of New York, had no international relations or international law. But the villages and their villagers did have and continued to have a relationship, based on their leases, with the still quasi-independent Seneca Nation.

Relator argues that the specific reference in the above quoted 1875 Congressional statute to state laws concerning highways and bridges shows that the later-used term "municipal laws" had no application to State laws. On the contrary, we think that the statute itself shows why the highway and bridge laws were separately mentioned, i. e., [fol. 84] because the Seneca nation in council was to have the right to extend those laws to the whole reservation.

The order should be affirmed.

Lehman, Ch. J., Loughran, Lewis, Conway, Thacher and Dye, JJ., concur.

[fol. 85] IN COURT OF APEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 1st day of March in the year of our Lord one thousand nine hundred and forty-five, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding.
John Ludden, Clerk

THE PEOPLE &c., ex rel. DONALD A. J. RAY, Appellant,

against

WALTER B. MARTIN, as Warden of Attica State Prison, &c., Respondent

REMITTITUR—March 2, 1945

Be It Remembered, that on the 26th day of December in the year of our Lord one thousand nine hundred and forty-four, Donald A. J. Ray, the appellant in this cause, came here unto the Court of Appeals, by Thomas J. McKenna, his attorney, and filed in the Court *Court* a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department.

And Walter B. Martin, as Warden of Attica State Prison, &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General, and another, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Thomas J. McKenna of counsel for the appellant, and by Messrs. Henry S. Manley and Beverly S. Galloway of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Wyoming County, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Wyoming County, before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court before the Judge thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 86] Court of Appeals, Clerk's Office,
Albany, March 2, 1945.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 87] In County Court of Wyoming County

The People of the State of New York ex Rel. Donald A. J. Ray, Petitioner,

against

Walter B. Martin, as Warden of Attica State Prison, Attica, New York, Respondent

Order on Remittitur

An order having been made by this Court and entered in Wyoming County Clerk's Office on April 22, 1944, to the following effect:

> "Ordered, that the said writ of habeas corpus be, and the same hereby is dismissed, and that the relator be, and he hereby is, remanded to the custody of the Warden of Attica State Prison, Attica, New York."

And appeals to the Appellate Division, Fourth Department, and to the Court of Appeals, from such order and an order affirming it, having resulted in each successive appeal in affirmance, and the Court of Appeals having sent hither its remittitur to the effect that the order of the Appellate Division affirming the order of this Court be affirmed; now therefore, upon such remittitur and the previous proceedings herein, and upon motion of the Attorney-General, it is hereby,

Ordered, that such remittitur and this order be filed in the office of the Clerk of this Court, and become parts of the record herein.

March 8th, 1945.

Barber B. Conable, County Judge of Wyoming County:

[fol. 88] In the Supreme Court of the United States

[Title omitted]

Petition for Appeal

To Hon. Robert H. Jackson, Associate Justice of the United States Supreme Court:

The above named Donald A. J. Ray, feeling aggrieved by the judgment of the County Court of the State of New York entered in the Clerk's Office of the County of Wyo-

ming, at Warsaw, New York, on March 8, 1945, upon the remittitur and final decision of the Court of Appeals of the State of New York handed down on March 1, 1945, in this cause, which said court is the highest court of the State of New York in which a decision in this suit and matter could be had, hereby prays for the allowance of an appeal herein to the Supreme Court of the United States to the end that said judgment and the decision of the said Court of Appeal upon which the same was entered, may be there reviewed and considered and justice done this appellant, and that an order be made allowing such appeal, fixing the amount of the bond required of the petitioner herein on such appeal, and that a transcript of the record proceedings and papers in this cause duly authenticated by the Clerk of the County Court of the County of Wyoming, New York, under the hand and seal of such court may be sent to the Supreme Court of the United States as provided by law.

The Court of Appeals affirmed an order of the Wyoming County Court entered in the office of the Clerk of the County [fol. 89] of *of* Wyoming at Warsaw, New York, on the 22nd day of April, 1944. The order dismissed a writ of habeas corpus and remanded relator to the custody of respondent as Warden of Attica State Prison. The order of the Court of Appeals was made an order of the Wyoming County Co-rt by the filing of the remittitur of the Court of Appeals dated March 2, 1945, together with an order making the judgment of the Court of Appeals the judgment of County Court in the office of the Clerk of the County of Wyoming at Warsaw, New York, on March 8, 1945. The order of the Appellate Division making the order of that court the order of the County Court and the remittitur of the Appellate Division was signed and filed and entered in the Office of the Clerk of the County of Wyoming on the 13th day of October, 1944.

That thereby said judgment became and is the final judgment of the highest court of the State of New York in which a decision in this cause could be had and that the County Court of the State of New York has possession of the record in this cause.

Petitioner respectfully shows that this cau.e is one in which a review can be had in the Supreme Court of the United States as a matter of right in that a final judgment has been rendered in the highest court of the State of New

York in which a decision could be had, and that the validity of statutes of the State of New York was drawn in question on the ground of their being repugnant to the Constitution, the Treaties and Statutes of the United States and the decision was in favor of their validity.

Opinions rendered by the Courts below are reported in Matter of Ray, 54 Fed. Supp. 218; U. S. ex rel. Ray vs. Martin, 141 Fed. 2d 218; People ex rel. Ray vs. Martin, 181 Misc. 985; People ex rel. Ray, 268 A. D. 218; People ex rel. Ray vs. Martin, 294 N. Y. 415.

[fol. 90] Copies of such opinions are annexed hereto.

Respectfully submitted, Donald A. J. Ray, by Thomas J. McKenna, Counsel.

[fol. 91] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The Appellant, Donald A. J. Ray, assigns the following errors in the record and proceedings had in this case:

The Court of Appeals, the court of final jurisdiction in the State of New York, erred:

1. In holding that petitioner could be tried and convicted and sentenced for a violation of Section 1044, Subdivision 2 and 1045-a of the Penal Law of the State of New York for the crime in question when committed by a non-Indian as against a non-Indian in the City of Salamanca, New York. The present City of Salamanca, being part of the Allegany Reservation, which, with several others, was set aside by the United States pursuant to Treaties for the Seneca Nation of Indians.

2. In holding that the New York State Court had jurisdiction of the offense in question (felony murder) despite the terms of a treaty entered into with the Iroquois Six Nations of Indians in 1794 (7 Stat. at Large 44).

3. In holding that the treaty did not exclude New York State jurisdiction over the offense committed in the City of Salamanca.

4. In holding that Section 8 of the Federal Act of 1875 (Ch. 90, 18 Stat. L. 330) conferred jurisdiction of the offense in question.

[fol. 92] 5. In holding that that Act (The Federal Act of 1875) was a proper legal basis for the enactment of Section 71 of the Indian Law of the State of New York.

6. In holding that the State Court had jurisdiction of this offense by virtue of the validity of Section 71 of the Indian Law of the State of New York.

7. In holding that Section 217 of Title 25, U. S. C., Annotated, did not confer jurisdiction upon the Federal Courts for the offense in question.

8. In holding that subdivision 3 of Section 451 of Title 18, U. S. C., and Section 452 of Title 18, U. S. C. did not confer the jurisdiction of the offense in question.

9. In holding that the last three mentioned sections, when read together, did not apply to the offense in question when committed on the lands in question.

Prayer for Reversal

Because of the foregoing errors, the appellant, Donald A. J. Ray, prays that the said judgment of the County Court of the County of Wyoming, New York, and the decision of the Court of Appeals of the State of New York upon which said judgment was entered, in the above-entitled cause, be reviewed by the Supreme Court of the United States and reversed and judgment rendered in favor of the Appellant, with costs in all courts.

Donald A. J. Ray, by Thomas J. McKenna.

[fol. 93] In the Supreme Court of the United States

[Title omitted]

Order Allowing Appeal

The appellant in the above entitled action having prayed for the allowance of an appeal herein to the Supreme Court of the United States from the judgment of the County Court of the State of New York entered in the office of the Clerk of the County of Wyoming, New York, on the 8th day of March, 1945, upon the remittitur and final decision of the Court of Appeals of the State of New York bearing date March 1, 1945, and having presented and filed his

petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction on appeal pursuant to the statutes of the United States and the rules of the Supreme Court of the United States, it is

Ordered, that an appeal be and the same hereby is allowed to the Supreme Court of the United States as provided by law, and it is further

Ordered, that the Clerk of the County Court of the County of Wyoming and State of New York, to which Court the record herein has been remitted, shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that the transcript shall reach said Court within forty days of the date of this order, and it is further

[fols. 94-99] Ordered, that security for costs herein be fixed in the sum of Five Hundred ($500.00) Dollars.

Dated, May 16, 1945.

Robert H. Jackson, Associate Justice of the United States Supreme Court.

I am allowing the appeal herein with the same doubts expressed by Chief Judge Lehman in order to bring the question before the full court.

R. H. J.

[fol. 100] In the Supreme Court of the United States

[Title omitted]

Statement of Points to Be Relied Upon—Filed July 5, 1945

Point I

Section 71 of the New York State Indian Law which undertook to extend into the locus in quo within an Indian Reservation the general laws of the State, which included among others Section 1044, Subdivision 2 of the Penal Law, the "felony murder" for which appellant was tried and Section 1045-A of the same law under which he was sentenced to life imprisonment, is repugnant to Article I, Section 8, Clause 3 of the United States Constitution and

Treaties and Federal Laws made under that constitutional provision and the New York State Court erred in holding that section of the Indian Law was a valid basis for state jurisdiction of the offense.

Point II

Treaties made under the Federal constitutional provision and Federal statutes enacted thereunder to cover the offense in question within the locus in quo rendered invalid Section 1044, Subdivision 2 of the State Penal Law and section 1045-A of the same State Law and the New York State Court erred in holding said State penal statutes valid and applicable to the place in question without the aid of the heretofore challenged Section 71 of the State Indian Law.

[fol. 101] Point III

Appellant's commitment and incarceration by virtue of an order of the Supreme Court of the State of New York in violation of what has been set forth under Points I and II of this brief is a violation of appellant's rights guaranteed by Amendment XIV, Section 1 of the Constitution of the United States and appellant is entitled to the remedy of habeas corpus.

Respectfully submitted, Thomas J. McKenna, Attorney for Appellant, Office & P. O. Address, 706 Morgan Bldg., Buffalo, New York.

[File endorsement omitted.]

[fol. 101-a] In the Supreme Court of the United States

[Title omitted]

Designation of Parts of Record To Be Printed—Filed July 11, 1945

I, Thomas J. McKenna, as attorney for appellant, think the following parts of the record necessary for the consideration of this Court:

Printed record on appeal to the Court of Appeals;

Opinion of the Court of Appeals, Desmond J. (This document is a part of the appellant's jurisdictional state-

ment and need not be included or certified separately therefrom);

Remittitur of the Court of Appeals;

Order of Judge Conable on remittitur;

Petition for appeal, assignment of errors and prayer for reversal;

Jurisdictional statement (If consistent with the Rules only the opinion of the Court of Appeals, as previously listed, should be in the transcript of record as printed under direction of the Clerk of the Supreme Court);

Order allowing appeal, signed by Mr. Justice Jackson on May 16, 1945;

Proofs of service (to be omitted in printing);

Statement directing attention to Rule XII, 3 and proof of service (to be omitted in printing);

Bond for costs on appeal (to be omitted in printing);

Respectfully submitted, Thomas J. McKenna, Attorney for Appellant, Office & P. O. Address, 706, Morgan Bldg., Buffalo, New York.

[fol. 101-b] [File endorsement omitted]

[fol. 102] SUPREME COURT OF THE UNITED STATES

[Title omitted]

Appeal from the County Court of Wyoming County, State of New York

ORDER DISMISSING APPEAL AND GRANTING CERTIORARI—October 8, 1945

The appeal in this case is dismissed for want of jurisdiction, sec. 237(a) of the Judicial Code as amended, 28 U. S. C., sec. 344(a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by sec. 237(c) of the Judicial Code as amended, 28 U. S. C., sec. 344(c), certiorari is granted. The Solicitor General of the United States is invited to file a brief amicus curiae if he is so advised.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this case.

[fol. 102-a] [Endorsed on Cover:] Enter Thomas J. McKenna. File No. 49,861. New York, County Court, Wyoming County, Term No. 158. The People of the State of New York, ex rel. Donald A. J. Ray, Appellant, vs. Walter B. Martin, as Warden of Attica State Prison, Attica, New York. Filed June 23, 1945. Term No. 158, O. T. 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 23 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 158

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. DONALD A. J. RAY,

Appellant,

vs.

WALTER B. MARTIN, AS WARDEN OF ATTICA STATE PRISON, ATTICA, NEW YORK

APPEAL FROM THE COUNTY COURT OF WYOMING COUNTY, NEW YORK

STATEMENT AS TO JURISDICTION

THOMAS J. McKENNA,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	3
The statutes of the State, the validity of which is involved	4
The constitutional provisions, treaties and federal statutes which it is claimed invalidate and nullify the state statutes heretofore alluded to	6
Date of judgment or decree sought to be reviewed and date upon which application for order allowing appeal was presented	15
Statement showing nature of cause and rulings to bring case within jurisdictional provisions	16
Statement regarding facts	16
Facts	16
Contention of appellant	17
History of prior habeas corpus proceedings and means and proceedings by which question was raised in state courts	19
Statement re grounds that question is substantial	21
Cases believed to sustain jurisdiction	22
Appendix "A"—Opinion of District Court of the United States for the Western District of New York	29
Appendix "B"—Opinion of the United States Circuit Court of Appeals for the Second Circuit	34
Appendix "C"—Opinion of County Judge denying writ	35
Appendix "D"—Opinion of the Appellate Division, Fourth Department	49
Appendix "E"—Opinion of the Court of Appeals of New York	52

Table of Cases Cited

City of Salamanca v. *U. S.*, 316 U. S. 694, 62 Sup. Ct. 1293	18
Hawk, Ex parte, 321 U. S. 14	26
New York Indians, 5 Wall. 761	6

Page

People v. *Ray*, 172 Misc. 1004, 282 N. Y. 680 17
People ex rel. Carr v. *Martin*, 286 N. Y. 27 28
People ex rel. Ray v. *Martin*, 181 Misc. 985, 268 A. D. 218, 294 N. Y. 451 20
Ray, Matter of, 54 Fed. Supp. 218 19
U. S. v. *Forness*, 37 F. Supp. 337, 125 F. (2d) 1928 18
U. S. ex rel. Ray v. *Martin*, 141 Fed. (2d) 218 20
U. S. ex rel. Rogalski v. *Jackson*, 146 Fed. (2d) 251 27
Worcester v. *Georgia*, 6 Pet. 515 22

STATUTES CITED

Act of Congress of 1890 (26 Stat. 558, ch. 1132) 14
Act of Congress of 1875 (ch. 90, 18 Stat. L. 330) 14
Act of Congress of February 13, 1925 (Ch. 229, Sec. 1, 43 Stat. 936), as amended 3
Act of Congress of April 26, 1928, Ch. 440, 45 Stat. 466, as amended 3
Constitution of the United States:
Article I, Section 8, Clause 3 18
14th Amendment 17
Hand Book of Federal Indian Law by Felix S. Cohen (page 420) 21
Indian Law of the State of New York, Section 71 4
Penal Law of the State of New York:
Section 1044 4,5
Section 1045-a 4,6
Revised Statutes, Section 2079 (Now Sec. 71 of Title 25 U. S. C.) 13
Treaty of 1794 6,16
Treaty of 1838 6
Treaty of 1842 6
United States Code:
Title 18, Section 451 13
Title 18, Section 452 13
Title 25, Section 217 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 158

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. DONALD A. J. RAY,

Appellant,

vs.

WALTER B. MARTIN, AS WARDEN OF ATTICA STATE PRISON, ATTICA, NEW YORK,

Appellee

JURISDICTIONAL STATEMENT

In compliance with Rule XII of the Rules of the Supreme Court of the United States, the applicant, Donald A. J. Ray, submits herewith, a statement showing the basis of the jurisdiction of the Supreme Court of the United States to review on appeal the final judgment of the County Court of the County of Wyoming in the State of New York, entered in this cause upon the Order and Remittitur of the Court of Appeals of the State of New York, the highest Court of that State. The decision was made by the highest Court on March 1st, 1945. The Remittitur of that Court was duly certified by the Clerk of that Court on March 2nd, 1945. Upon that Remittitur an order was granted by the County

Judge making the judgment of the Court of Appeals the Order of the County Court of the County of Wyoming on March 8th, 1945. On that same date, March 8th, 1945, the Remittitur of the Court of Appeals and the Order of the County Court, making the order of the Court of Appeals the order of the County Court, were duly entered in the Office of the Clerk of the County of Wyoming at Warsaw, New York.

Application for an order allowing an appeal to this Court was presented on May 4, 1945, to Mr. Justice Robert H. Jackson, a Justice of the Supreme Court of the United States.

On May 7, 1945, the office of the Clerk of the Supreme Court of the United States, at Washington, D. C., informed applicant that Justice Robert H. Jackson would not act upon the application as a matter of policy, until after the application for appeal had been presented to Chief Justice Irving Lehman of the Court of Appeals of the State of New York, and denied by him. In accordance with that direction, application for an Order allowing an appeal to the United States Supreme Court was, on the 14th day of May, 1945, presented to the Honorable Irving Lehman, Chief Judge of the New York State Court of Appeals, who denied said application with the following comment:

> "I am denying the application solely because I am not sure under the practice of the Supreme Court that the question here involved is whether the statute itself is invalid rather than whether a right claimed by the appellant under the Constitution, treaties and laws of the United States has been erroneously denied, and I prefer to have so doubtful a question of practice passed upon by a Justice of the Supreme Court. I may add that except for this doubt I should certainly have granted the application.
>
> (Signed) IRVING LEHMAN,
> *Chief Judge of the New York,*
> *State Court of Appeals.*"

Application for an order allowing an appeal to this Court was again presented on May 16th, 1945, to Mr. Justice Robert H. Jackson, a Justice of the Supreme Court of the United States.

Statutory Provision Sustaining Jurisdiction.

The Act of Congress of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, effective May 13, 1925, amending and reenacting Section 237(a) of the Judicial Code (U. S. Code, Annotate, Title 28, Section 344) provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

The Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, amending Section 2 of the Act of Congress of January 31, 1928, Public, numbered 10, Seventieth Congress, hereinbefore cited, provides:

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The Statutes of the State, the Validity of Which Is Involved

The Statutes of the State of New York and portions thereof, the validity of which is drawn into question in this cause, are Section 71 of the Indian Law of the State of New York, and Sections 1044 and 1045-a of the Penal Law of the State of New York.

Section 71 of the Indian Law of the State of New York, as set forth in McKinney's Consolidated Laws of New York, Annotated, Book 25, insofar as applicable, provides as follows:

> "*Sec. 71. Exclusion of villages from reservations; lease of lands therein; certification of copies of leases granted by the Seneca nation of Indians and recording thereof.* Those parts of the Allegany reservation included in the villages of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, as surveyed, located and established pursuant to an act of congress approved February nineteenth, eighteen hundred and seventy-five, have been constituted parts of the several towns within which they are located, and all the general laws of the state are extended over and apply to the same; except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States. Lands in such villages held under lease from the Seneca nation of Indians, and which the holders are entitled to have renewed by virtue of such act of congress, shall be for all purposes considered a freehold estate, and the right of dower and tenancy by the courtesy shall attach thereto, and such lands, upon the intestacy of the holder, shall descend the same as a freehold of inheritance. But the rights of the Indians in such leases shall descend as provided by the laws of the Seneca nation of Indians. * * *"

("This section was Indian Law of 1892, ch. 679, Sec. 71. It was amended to read as above by L. 1915, ch. 339. * * *")

Section 1044 of the Penal Law is set forth in McKinney's Consolidated Laws of New York, Annotated, Book 39, as follows:

"*Sec. 1044. Murder in first degree defined.*

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

1. From a deliberate and premediated design to effect the death of the person killed, or of another; or,

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or,

3. When perpetrated in committing the crime of arson in the first degree.

4. A person who willfully, by loosening, removing or displacing a rail, or by any other interference, wrecks, destroys or so injures any car, tender, locomotive or railway train, or part thereof, while moving upon any railway in this state, whether operated by steam, electricity or other motive power, as to thereby cause the death of a human being, is guilty of murder in the first degree, and punishable accordingly.

Historical Note

Section derived from Penal Code, Sec. 183, L. 1881, c. 676, as amended by L. 1882, c. 384, Sec. 1; and from Penal Code, Sec. 183-a, as added by L. 1897, c. 548, Sec. 1."

Section 1045-a of the Penal Law is set forth in McKinney's Consolidated Laws of New York, Annotated, Book 39, as follows:

> "*Sec. 1045-a. Life imprisonment for felony murder; jury may recommend.* A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life. Added L. 1937, c. 67, Sec. 2, eff. March 17, 1937."

The Constitutional Provisions, Treaties and Federal Statutes Which It Is Claimed Invalidate and Nullify the State Statutes Heretofore Alluded To.

Although two treaties were made subsequent to the Treaty of 1794, involving this particular reservation, one in 1838 and another in 1842, the latter treaty provided the Treaty of 1794 should be determinative of the rights enjoyed by this particular reservation.

Reversion of this issue to this 1794 treaty is clearly set forth and explained in the review of the facts in the case of New York Indians, 5 Wall. 761 (1866) where, at page 767, the court said:

> "By the treaty of 1838 the Seneca nation on these reservations agreed to remove to the west of the Mississippi River, and, at the same time, with the consent of the United States, sold their lands to Ogden & Fellows, who held the pre-emptive right, derived from Massachusetts, and executed a conveyance of the same. The treaty provided for the removal within five years. It was proclaimed April 4, 1840. Before the expiration of the five years, difficulties arose between the grantees and the Indians, which resulted in a new treaty, 20th May, 1842, between the United States and

the Seneca nation, when it was agreed that the deed embracing these two reservations should be cancelled, and the Indians remain as before with all their original rights. The words are: 'The said nation shall continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus reservation and the Allegany reservation, with the same right and title in all things as they had and possessed therein immediately before the sale of said reservation.'"

The Particular Treaty involved (Vol. 7 Stat. at Large 44) Nov. 11, 1794:

Proclamation,
Jan. 21, 1795.

A TREATY BETWEEN THE UNITED STATES OF AMERICA, AND THE TRIBES OF INDIANS CALLED THE SIX NATIONS

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE I

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE III

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong-yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, about fort Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser being the eastern boundary of a strip of land, extended from the same line to Niagara river, which the Seneka nation ceded to the King of Great Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the northeast corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the southwest corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelp's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V

The Seneka nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of traveling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbours, and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE VI

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the

Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of Three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE VII

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs; and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States; For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In Witness Whereof, the said Timothy Pickering, and the Sachems and War-chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Kon-on-daigua in the State of New York, the eleventh day of November, in the Year one thousand seven hundred and ninety-four.

TIMOTHY PICKERING.

Necessary Portion of Treaty Making Treaty of 1794 Applicable. (7 Stat. at large 586.)

May 20, 1942.
Proclamation,
Aug. 26, 1942.

ARTICLES OF A TREATY

Made and concluded at Buffalo Creek, in the State of New York, on the twentieth day of May in the year one thousand eight hundred and forty-two, between the United States of America, acting herein by Ambrose Spencer their Commissioner, thereto duly authorized, on the one part, and the chiefs, headmen and warriors of the Seneca Nation of Indians, duly assembled in council, on the other part.

WHEREAS, a treaty was heretofore concluded, and made between the said United States, and the chiefs, headmen and warriors of the several tribes of New York Indians, dated the fifteenth day of January in the year one thousand eight hundred and thirty-eight which treaty having been afterwards amended, was proclaimed by the President of the

United States, on the fourth of April one thousand eight hundred and forty, to have been duly ratified.

And whereas divers questions and differences having arisen between the chiefs and headmen of the Seneca nation of Indians or some of them, and the said Thomas Ludlow Ogden and Joseph Fellows in relation to the said indenture and the rights of the parties thereto, and the provisions contained in the said indenture, and the rights of the parties thereto, and the provisions contained in the said indenture being still unexecuted, the said parties having mutually agreed to settle, compromise and finally terminate all such questions and differences on the terms and conditions hereinafter specified.

Now therefore, it is hereby mutually declared, and agreed, by and between the said parties as follows.

ARTICLE FIRST: The said Thomas Ludlow Ogden and Joseph Fellows in consideration of the release and agreements hereinafter contained, on the part of the said Seneca nation do on their part consent, covenant and agree that they the said nation (the said indenture notwithstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden and Joseph Fellows the right of preemption, and all other the right and title which they then had or held in or to the said tracts of land. . . .

SECTION OF FEDERAL STATUTES DISPENSING WITH TREATIES BUT RESERVING EXISTING RIGHTS OF PRE-EXISTING TREATIES

Act of March 3, 1871.

Section 2079 Rev. Stat., Now Sec. 71 of Title 25 U. S. C.

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

SUBDIVISION OF FEDERAL STATUTE PROVIDING FOR TERRITORIAL JURISDICTION OF OFFENSE AND STATUTE SETTING FORTH FACTS WHICH MAKE OFFENSE OF MURDER, FIRST DEGREE.

Section 451 of Title 18 U. S. C. insofar as applicable provides:

"(Criminal Code 272) Places and Waters applicable; on board American vessel on high seas or Great Lakes; on land under exclusive control of United States; Guano Islands. The crimes and offenses defined in this chapter shall be punished as herein prescribed."

Subdivision 3 thereof provides as follows:

"When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

Section 452 of Title 18 U. S. C. provides as follows:

"(Criminal Code, Section 273) Murder; first degree; second degree; Murder is the unlawful killing of a

human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed is murder in the first degree. Any other murder is murder in the second degree. (R. S. Sec. 5339; Mar. 4, 1909, c. 321, Sec. 273, 35 Stat. 1143.)"

STATUTE WHICH EXTENDS CRIME IN QUESTION TO CITY OF SALAMANCA

Section 217, Title 25 U. S. C. reads as follows:

"Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country. (R. S. Sec. 2145.)"

APPLICABLE PORTION OF FEDERAL ACT OF FEB. 19, 1875 BASED ON STATE'S REQUEST WHICH APPARENTLY WAS RELIED ON AS A SOURCE OF NEW YORK STATE COURT JURISDICTION. (Ch. 90, 18 Stat. L. 330.)

By subsequent Act of Congress, in 1890, the number of years such leases were to run was extended (26 Stat. 558, ch. 1132.) This subsequent act did not change applicable Section 8 of that Act which provides as follows:

"That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may with the consent of said Seneca Nation in council, extend to, and be in force beyond said villages in said reservations, or in either of them; and

all municipal laws and regulations of said State may extend over and be in force within said villages; Provided, nevertheless, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States." (18 Stat. L. 331.)

Date of Judgment or Decree Sought to Be Reviewed and Date upon Which Application for Order Allowing Appeal Was Presented.

The date of the judgment sought to be reviewed, as heretofore pointed out in this statement, is March 8, 1945.

The order in question dismissed a writ of habeas corpus and remanded relator to the custody of respondent as Warden of Attica State Prison.

On March 1, 1945, the Court of Appeals of the State of New York, the final and highest Court of appellate jurisdiction of that State affirmed an order of the Appellate Division, Supreme Court, Fourth Department. The Appellate Division had therefore and on the 27th day of September, 1944, affirmed an order of the County Court of the County of Wyoming made on the 11th day of April, 1944. The order of the County Court was filed in the County Clerk's Office of the County of Wyoming at Warsaw, New York, on the 22nd day of April, 1944. The order of the Appellate Division making the order of that appellate Court the order of the County Court and the remittitur of the Appellate Division was signed and filed and entered in the Office of the Clerk of the County of Wyoming on the 13th day of October, 1944.

That thereby said judgment became and is the final judgment of the highest Court of the State of New York in which a decision in this cause could be had and that the County Court of the State of New York has possession of the record in this cause.

Application for an order allowing an appeal to the United States Supreme Court having been denied by the Court of

Appeals of the State of New York, application for an order for leave to appeal to the United States Supreme Court was again presented to the Honorable Robert H. Jackson, Associate Justice of the United States Supreme Court on May 16, 1945.

Statement Showing Nature of Cause and Rulings to Bring Case Within Jurisdictional Provisions

Statement Regarding Facts

There is no dispute as to the facts. This is so notwithstanding a denial in the Attorney-General's answer to petitioner's allegation that the City of Salamanca is within the Allegany Reservation (Fols. 23, 64.) The denial in the answer, as agreed and stipulated during the argument of the motion before the County Judge, was predicated on the legal question of whether or not the Congressional Act of February 19, 1875, 18 Stat. 330, had the legal force and effect of placing the City of Salamanca beyond laws applicable to other portions of the reservation. In other words, it was conceded and stipulated that the locus of the crime was within the geographical limits of the reservation, as prescribed by the Treaty of 1794. (7 Stat. at large, 44.)

Facts

The relator was indicted by a grand jury of the County of Cattaraugus for the crime of murder in the first degree alleged to have been committed September 16, 1939 in the City of Salamanca in said county and within the geographical limits of the Allegany Reservation as prescribed by the Treaty of 1794 (7 Stat. at Large, 44).

The relator is, and the deceased was, a white man.

On the 4th day of December, 1939, he was convicted in the Supreme Court of Cattaraugus County on an indictment which charged a killing while engaged in the commission

of a robbery, Sections 1044, 1045-a of the Penal Law of the State of New York and on December 15, 1939 was sentenced to be confined in Attica State Prison for the term of his natural life.

People v. *Ray*, 172 Misc. 1004.

Direct appeal to the Court of Appeals was dismissed. 282 N. Y. 680 mem.

An application for leave to appeal to the Court of Appeals was denied.

The jurisdiction of the Supreme Court of the State of New York to try the prisoner was not challenged during the trial nor was any such question at any time raised or passed upon on any appeal from that conviction in the State courts.

Contention of Appellant

Relator-appellant, arguing for his release on a petition for writ of habeas corpus, contended that his "due process" rights, under the Fourteenth Amendment, Section 1, of the Constitution of the United States, had been violated. That amendment insofar as applicable provides:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

He took the position that Section 71 of the Indian Law of the State of New York or any other statute of the State of New York or presumption of law, relied on by the courts of the State of New York to extend State jurisdiction of this offense into the Allegany Indian reservation, violated the terms of a 1794 treaty (7 Stat. at large, 44).

That treaty between the Six Nations of Indians and the Federal Government, he insisted, was of such a nature as to divest the Supreme Court of the State of New York of jurisdiction over the crime in question, when committed on the lands in question. This violation of the treaty, he urges, was repugnant to Article 1, Section 8, Clause 3 of the Federal Constitution which governs the treaty making power of the United States Government. That constitutional clause provides;

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

He pointed out that any doubt that the Congressional Act of 1875 (ch. 90, 18 Stat. L. 330) had the force and effect of authorizing the New York State Legislature to make and extend its laws into the locus in quo was definitely settled in his favor when the United States Supreme Court refused to act on a decision and opinion of the United States Circuit Court of Appeals. That opinion recited that the 1875 Act, aside from permitting a leasing of lands and extending the State highway law into the reservation, "did not make the 'law' • • • statutory or decisional • • • of the State of New York applicable to the reservation." (*U. S.* v. *Forness*, D. C. N. Y. (1941), 37 F. Supp. 337, reversed C. C. A. (1942, 2nd Circuit) 126 F. 2d 1928, Certiorari denied, *City of Salamanca* v. *U. S.*, 1942, 62 S. Ct. 1293, 316 U. S. 694.)

Three Federal jurisdictional statutes of a somewhat general application, enacted subsequent to the 1794 Treaty, he maintained, were so phrased as to fall within and become part of the contemplated future Congressional legislation provided for by the latter portion of Article VII of that treaty. Those statutes are:

> Section 217 of Title 25, U. S. C., and Subdivision 3 of Section 451 of Title 18, U. S. C., and Section 452 of the same title.

He, however, emphasized the fact that, even if the Court should come to the conclusion that those three statutes did not apply, either alone or together, he was still entitled to the relief sought by force of the provisions of the treaty.

Other state and federal legislation and also state and federal court decisions were placed before the court to support and substantiate his prayer for relief.

History of Prior Habeas Corpus Proceedings and Means and Proceeding by Which Question Was Raised in State Courts.

The relator petitioned for a Writ of Habeas Corpus to the United States District Court for the Western District of New York. His petition was there denied upon an opinion of the Honorable John Knight, United States District Judge, filed July 19, 1943, upon the ground, first, that the petitioner could not invoke the jurisdiction of a Federal Court upon a writ of habeas corpus until he should have exhausted his remedies in the State Courts. Secondly, Judge Knight held that the Supreme Court of the State of New York had jurisdiction to try, convict and sentence for such an offense on the lands in question.

(*Matter of Ray*, 54 Fed. Supp. 218; Fols. 30 to 52.)

This decision was appealed to the Circuit Court of Appeals where it was affirmed on the theory of necessity of exhaustion of State remedies. Judge Jerome Frank writing the opinion of the Court held that the Federal Courts are inhibited from deciding the matter unless and until the State Courts shall have proved that they "will not or cannot do justice." Other than by means of that statement, the majority of the Court refrained from expressing any opinion upon the issue as to whether the State Court had jurisdiction, but Judge Clark concurred with opinion of the District Court Judge upon the additional and alternative

ground that the New York Supreme Court had jurisdiction (*U. S. ex rel. Ray* v. *Martin*, 141 Fed. 2d 218; Fols. 52 to 60). Following that decision, the matter was initially presented in the State courts by a writ of habeas corpus sued out before Justice Conable, County Judge of Wyoming County. Justice Conable in an opinion denied the writ (*People ex rel. Ray* v. *Martin*, 181 Misc. 985; Fols. 91 to 150).

From an order based on that decision an appeal was taken to the Supreme Court, Appellate Division, Fourth Department (Fols. 7 to 10). That Court, with opinion, affirmed the judgment or order of the County Court of Wyoming County (*People ex rel. Ray*, 268 A. D. 218; Fols. 163 to 187).

An appeal was taken to the Court of Appeals which, on March 1, 1945, affirmed the order of the Appellate Division which had previously affirmed the order of the County Court.

294 N. Y. ~~451~~ 61 (Opinion has not been published in official citators).

That the Court of Appeals directly passed upon the question involved in the appeal to this Court is to be gathered from that Court's opinion, which, with four other prior opinions, is hereto annexed. On pages ~~415~~ 65 and ~~416~~ 66 of that Opinion appears the following:

> "• • • We content ourselves with a statement of the bases for our conclusion that relator was properly indicted, tried and punished in the Supreme Court, despite the undoubted fact that the crime was committed on lands which form part of an Indian reservation. In general, our reasons for that conclusion are these: that there is no basis in any treaty, Constitution or Statute for an assertion by the Federal Government of exclusive jurisdiction over crimes committed by non-Indians against non-Indians on this reservation, that such jurisdiction has historically, by

common consent and for sound legal reasons been assumed to exist, by the federal and state courts in New York and elsewhere, that this is peculiarly so as to the reservations of the "Six Nations" in New York State, and, finally, that there is a Federal Statute making applicable to the city of Salamanca the general laws of the State of New York. • • •."

Statement Re Grounds That Question Is Substantial

The petitioner respectfully submits that the questions under the Constitution, Treaties and Statutes of the United States properly raised and actually decided by the State Courts and now sought to be presented to this Court are substantial Federal questions which as applied to the circumstances of this cause have not been previously decided by this Court contrary to petitioner's contention and that this Court has jurisdiction to review. That the questions raised under the Constitution, Treaties and Statutes of the United States are important and novel in their application to the petitioner and require analysis and exposition for their determination.

Aside from the fact that this particular case involves the deprivation of a man's liberty for life, the magnitude of this question can readily be ascertained because of the vast territory and proper legal rights of the thousands of occupants of the lands in question. The Allegany Reservation, the one in question, consists of about 30,469 acres and the Cattaraugus Reservation, the rights of which will also be determined by a decision of this question, consists of about 21,680 acres.

Hand Book of Federal Indian Law by Felix S. Cohen (page 420).

Cases Believed to Sustain Jurisdiction

(a) A U. S. Supreme Court case directly in point

In the case of *Worcester* v. *Georgia, supra,* the United States Supreme Court was called upon to decide a like question concerning lands, reserved to the Indians within the State of Georgia under a treaty similar to the one in question. In that case, involving a white man's trespass contrary to State Law, the Supreme Court held that an attempt by the State Legislature of Georgia to apply its laws to the lands set aside for those Indians, under a treaty, similar to the one in question, was repugnant to the Constitution of the United States and treaties and laws made under it.

The decision of the United States Supreme Court in that case is set forth in 6 Pet. 515 on pages 595 and 596 as follows:

> "Under the administration of the laws of Georgia, a citizen of the United States has been deprived of his liberty; and, claiming protection under the treaties and laws of the United States, he makes the question, as he has a right to make it, whether the laws of Georgia, under which he is now suffering an ignominious punishment, are not repugnant to the constitution of the United States, and the treaties and laws made under it. This repugnancy has been shown; and it remains only to say, what has before been often said by this tribunal of the local laws of many of the states in this union that, being repugnant to the constitution of the United States, and to the laws made under it, they can have no force to divest the plaintiff in error of his property or liberty."

(b) A U. S. Supreme Court case, involving the reservation in question which held the Legislature of the State of New York could not extend its laws into these lands.

The first U. S. Supreme Court case, involving the particular reservation, is the case of New York Indians, *supra*, decided in 1866. The U. S. Supreme Court in that case decided that the legislature of the State of New York could not extend its laws in this particular locality. At Page 771 of 5 Wallace's Reports, in that case, the court said:

> "It will be seen on looking into the general laws of the State imposing taxes for town and county charges, as well as into the special acts of 1840 and 1841, that the taxes are imposed upon the lands in these reservations, and it is the lands which are sold in default of payment. They are dealt with by the town and county authorities in the same way in making this assessment, and in levying the same, as other real property in these subdivisions of the State. We must say, regarding these reservations as wholly exempt from State taxation, and which, as we understand the opinion of the learned judge below, is not denied, the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.
>
> The tax titles purporting to convey these lands to the purchaser, even with the qualification suggested that the right of occupation is not to be affected, may well embarrass the occupants and be used by unworthy persons to the disturbance of the tribe. All agree that the Indian right of occupancy creates an indefeasible title to the reservation that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of preemption. He is the only party that is authorized to deal with the tribe in respect to their property, and this with the consent of the government. Any other party is an intruder, and may be proceeded against under the twelfth section of the act of 30th June, 1834. * * *"

(c) A United States Supreme Court denial of certiorari from a United States Circuit Court of Appeals decision

holding that the 1875 Congressional Act extended only Highway and Bridge Laws into the locus in quo and that any other statutory or decisional law of the State of New York did not apply to this reservation.

Again in 1942 the aid of the United States Supreme Court was invoked by delinquent lessees of the lands in question to set aside a decision based on an opinion of the United States Circuit Court of Appeals in this Circuit (*U. S.* v. *Forness*, 125 Fed. 2d 1928) wherein that Court, at page 932, said "We conclude, then, that the statute did not make the 'law'—Statutory or decisional—of the State of New York applicable to the reservation." In that case, the United States Supreme Court denied Certiorari. (*City of Salamanca* v. *U. S.*, 1942, 62 S. Ct. 1293, 316 U. S. 694.)

The opinion of the Circuit Court of Appeals in the *Forness* case, *supra*, before reaching the above quoted conclusion, at page 932 of 125 Fed. Rep. 2d, pointed out the following as a basis for the unanimous determination of that Court:

> "* * * (2, 3) Appellees argue that this suit, brought by the United States on behalf of the Seneca Nation to enforce the cancellation, is in effect an action of ejectment, and that the action is barred by Sections 997-999 of the New York Civil Practice Act, which provide that upon a tender of the arrears of rent before judgment, the court shall dismiss the complaint. But state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent.
>
> Worcester v. Georgia, 6 Pet. 515, 560, 8 L. Ed. 483; Patterson v. Seneca Nation, 245 N. Y. 433, 156 N. E. 734; Mulkins vs. Snow, 232 N. Y. 47, 51, 133 N. E. 123; cf. The New York Indians, 5 Wall, 761, 18 L. Ed. 708. But, it is argued, such consent to the application of state law was granted by Congress, by the Act of Feb-

ruary 19, 1875, which authorized this lease and permitted the laying out of villages on the Cattaraugus and Allegany reservations of the Seneca Nation. Section 8 of that Act provided * * * (B. p. 50:

(4-6) Appellees assert, and correctly, that the words 'Municipal laws' often are used to refer to the laws of a country dealing with intra-mural matters as distinguished from 'international laws' dealing with its extra-mural affairs. Appellees then go on to insist that the symbol 'municipal laws' has only that single referent, regardless of context. Such an argument involves the 'one-word-one-meaning' fallacy. Similar reasoning would compel the conclusion that a clothes-horse is an animal of the equine species, and make it impossible to speak of drinking a toast. When, as in the statute, the 'laws' of a state of the Union are under discussion, there can be no intelligent reference to its international or extra-mural laws, for it has none under our Federal Constitution. Appellees' construction would, in effect, read the word 'municipal' out of the statute. 'Municipal laws' of such a state can have but one referent, i. e., the laws of its municipalities. The meaning is the same as when we speak of the 'Municipal Building' of the City of New York. When confronted, as we are here, with a word having two meanings, we should, of course, not select that meaning which gives it the least possible sense in the context in which it is used. In addition to the objection just indicated to appellees' construction, we can find no reason for the specific mention in the statute of state highway and bridge laws, if, as appellees contend, all state laws are comprehended in the generic term 'municipal laws.' We conclude, then, that the statute did not make the 'law'—statutory or decisional—of the State of New York applicable to the reservation. The provisions of the New York Civil Practice Act, therefore, do not bar the result asked by the Indians."

Nullified by virtue of this decision, said Section 71 of the State Indian Law, when relied on as a basis for state

jurisdiction for relator's incarceration, violated appellant's right of "due process" under Amendment 14, Section 1 of the Constitution of the United States.

Relator's federal constitutional right of "due process" was violated because said Section 71 of the State Indian Law, or any other statute of the State of New York, dependent thereon, or otherwise, for state jurisdiction of the offense in question on the place in question by the party in question, was repugnant to the Federal Constitution and treaties and laws made under it. The significance of the United States Supreme Court's action in denying a writ of certiorari should not be overlooked.

Petitioner respectfully submits that this case presents a judgment or decree in a suit in the highest court of the State of New York in which a decision in the suit could be had and that there is drawn in question the validity of the New York State Statutes on the ground that said statutes are repugnant to the Constitution, Treaties and Laws of the United States and that the decision in the State Court is in favor of the validity of the State statutes.

The quoted portions of the jurisdictional statutes heretofore outlined in this jurisdictional statement clearly show this to be a proper case of an appeal to the United States Supreme Court.

That petitioner must now appeal to the Court of Appeals is to be evidenced from a reading of the following from Ex Parte Hawk, 321 U. S. 14 (October Term, 1943) wherein, at page 116 this Court said:

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. Tinsley v.

Anderson, 171 U. S. 101, 104; Urquhart v. Brown, 205 U. S. 179; United States ex rel. Kennedy v. Tyler, 269 U. S. 13; Mooney v. Holohan, supra, 115; Ex Parte Abernathy, 320 U. S. 219."

The necessity of appeal to this Court is further emphasized in the case of *U. S. ex rel. Rogalski* v. *Jackson, which* was decided by the Circuit Court of Appeals, Second Circuit, on November 20, 1944 and is cited as 146 Fed. 2nd, 251.

In the Federal Supps. Advance Sheets of February 14, 1945, at pages 252, 253, of that citation, appears the following:

"After these numerous unsuccessful attempts to have his conviction set aside, Rogalski began the present proceeding to obatin a writ of habeas corpus from the United States District Court for the Northern District of New York. His petition alleged that his conviction was predicated solely on his presence in the automobile in which the two revolvers were found and the presumption contained in Section 1898-a, supra, that he was thereby guilty of illegal possession thereof. He contended that Section 1898-a was an unconstitutional provision in that it compelled him to rebut the presumption of innocence afforded to every accused person and that his conviction was therefore unlawful. Judge Brennan denied the application for the writ on the ground that the relator had not exhausted the right to appeal to the Supreme Court of the United States from the judgment of conviction. D. C. 58 F. Supp. 218. The per curiam opinion of the Supreme Court in Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 450, was cited in which it was stated that: 'Ordinarily an application for habeas corpus by one detained under a state court judgment or conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted.'

(1) From Judge Brennan's order denying the writ, Rogalski has appealed. We think the order was right and should be affirmed.

The question was properly raised in the State Court, (*People ex rel. Carr* v. *Martin*, 286 N. Y. 27, 31, 32).

In view of the foregoing it is respectfully submitted that this Honorable Court has jurisdiction of the appeal.

DONALD A. J. RAY,
Appellant,
By THOMAS J. MCKENNA,
Counsel.

APPENDIX "A"

Opinion of the United States District Court, Western District of New York

54 Fed. Sup. 218.

KNIGHT, District Judge:

Petitioner, a white man, on December 4, 1939, in the Supreme Court, Cattaraugus County, New York, was convicted and sentenced to life imprisonment for murder of a white man, in the City of Salamanca, Cattaraugus County, New York. The locus of the murder lies within the Allegany Indian Reservation; all the lands within the City of Salamanca being leased from the Seneca Nation of Indians. The conviction aforesaid was affirmed in the Appellate Division of the Supreme Court of New York and leave to appeal to the Court of Appeals of that state denied. In none of the proceeding had the question of jurisdiction been raised until the present. Petitioner, applying for a writ of habeas corpus, contends the courts of New York State have no jurisdiction of the offense charged within the City of Salamanca. The county and state, with the United States concurring, seek a denial of the writ on several grounds. It is asserted that the application here is prematurely made, because the petitioner has not exhausted his remedies in the state court. It does appear that no application for writ has been made in the state courts. It has repeatedly been held that one must avail himself of the remedies in the state courts before he can seek relief through habeas corpus in this court. The rule is distinctly stated in Jones v. Dowd, 128 F. (2d) 331, 334, wherein the court said:

> "A litigant in a State court is not at liberty to set in motion the jurisdiction of the Federal court by a petition for a writ of habeas corpus charging the State court has denied him due process under the Fourteenth Amendment, until the State has been given a chance to make its record under this same writ. The orderly administration of justice demands it."

To the same effect, see also: Mooney v. Holshan, 294 U. S. 103, 115, Stonefield v. Buchanan, 124 F. (2d) 23.

There is a further rule relating to the writ of habeas corpus in situations such as presented herein. It is distinctly stated in U. S. ex rel. Lesser v. Hunt, 117 F. (2d) 30, 31, which arose in this District, as follows:

> "As we have several times said, intervention by lower federal courts in such cases is justified only in the rarest instances; that is, only when the state courts will not, or cannot, do justice, * * * his remedy, if he had any, was only by application to the Supreme Court of the United States by certiorari."

The rule of comity requiring further proceedings to be taken before the United States Supreme Court, where a prisoner has been convicted in state courts and pursued his remedies of appeal therein, is also followed in other Circuits. See Johnson v. Wilson, 131 F. (2d) 1; Kramer v. Nevada, 112 F. (2d) 417; Jones v. Dowd, 128 F. (2d) 331; U. S. ex rel. Parker v. Carey, 135 F. (2d) 205.

Petitioner contends that exceptional circumstances are presented herein which should lead the court to exercise its discretion to issue the writ, citing in support thereof Bowen v. Johnson, 306 U. S. 19. An inspection of that case does not reveal any question of conflicting review by a federal court of a state court system, and I do not believe the language of the opinion should be so extended. It seems to me that any discretion in the court should be exercised in favor of the state. U. S. ex rel. Parker v. Carey, supra.

In view of the foregoing, I am of the opinion that the petition is insufficient in law and that the petitioner has chosen the wrong forum for relief, if he is entitled to any.

If I am in error in the above conclusion, it seems to me that the motion must be denied for another reason.

Originally New York and Massachusetts claimed sovereignty over the land in question, each under a crown grant from England. The dispute was settled in 1786 from Massachusetts ceding sovereignty to New York. The United States Constitution was adopted in 1787 taking away the power of the states of negotiating treaties in the constitutional sense and in due course of time treaties with the

Indians required the concurrence and approval of the national government. In 1871 by Act of March 3, 1871, (Sec. 2079 Rev. Stat.) the course of dealing with the Indians by treaty was abolished and in place therefor was substituted congressional action.

Under the Constitution there is no literal phrasing giving Congress the power of sovereignty in derogation of state sovereignty over the Indians. However, this has always been an implied power, and the Indian has been referred to as the ward of the nation, U. S. v. Kagama, 118 U. S. 375, U. S. v. National Gypsum Co., 40 F. Supp. 206, 210, and this power has extended to cover both the Indian and the reservation. Under the Constitution it is thus evident that the states have lost exclusive sovereignty over the Indians, and the question is presented to this court whether or not New York State has been relieved of its sovereignty in this case, the answer depending upon whether or not Congress has evinced any intent in the premises. If Congress has legislated to prescribe exclusive federal jurisdiction over the crime involved herein, the state law must bow thereto. U. S. v. National Gypsum Co., supra; U. S. v. National Gypsum Co., supra; U. S. v. Forness, 125 F. (2d) 928, 932.

Petitioner contends that Section 217 U. S. C. A., Title 25, extends the general laws of the United States to the Allegany Reservation and as a corollary thereto extends U. S. C., Title 18, Sec. 451, sub. sec. 3 and sec. 452, the former prescribing exclusive jurisdiction in the United States over crimes defined in the Chapter which includes the latter, or Section 452, defining murder and which includes the acts involved herein—homicide in the perpetration of a robbery. The crux of petitioner's contention lies in the interpretation of Section 217, Title 25 U. S. C. The language of that section is as follows:

> "Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of any crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

Does the language above quoted "Indian Country" include the City of Salamanca? An examination of Title 25, Chapt. 6, Sec. 211 and 266, shows that the phrase "Indian Country" is used therein innumerable times. Although ordinarily it would be presumed that the meaning of this phrase would be the same in each instance, this construction would yield if an inspection shows that different meanings were intended in the various uses. Section 219 prescribes requirements for the "Indian Country"; Section 220 authorizes removal of certain persons from the "Indian Country"; while Section 222 authorizes removal from "any tribal reservation"; Section 242 specifically defines Osage County, Oklahoma, as "Indian Country", but only within statutes prescribing the sale of intoxicants. Section 1 of the Act of 1834 defined "Indian Country" as land west of the Mississippi with certain exceptions. From the foregoing it is evident that the term "Indian Country" has been used in various meanings by Congress, and it is necessary to examine the particular section and circumstances to determine the meaning intended.

It is said that the term "Indian Country" embraces all land within the United States to which the Indian title has never been extinguished. Ex parte Crow Dog, 109 U. S. 556. In U. S. v. Leathers, 26 F. Cas. 16, 581, pp. 897, 899, it is stated:

> "From the earliest period of our history the boundaries of the Indian country have been narrowing. * * * The policy has been to separate the Indian tribes from the rest of the people, and to set apart for their exclusive use specific portions of the public domain. The statutes cited show that 'Indian Country' is the term used generally to describe country in the occupation of the Indians, to which their title or right of occupancy * * * has not been extinguished. * * *."

No cases are cited by or on behalf of petitioner which apply Section 217, Title 25, and Section 542, Title 18, to a similar set of facts as are herein presented.

Objectively it appears that there are six to eight Indian families residing in the City of Salamanca having a total population of about 9000. During the last 40 years several

murder cases have been prosecuted to conviction in the state courts as have generally all felonies where Indians have not been involved. Under the Act of Feb. 19, 1875, 18 Stat. 330, the municipal laws and regulations of New York were extended over the leased property and since incorporation as a city in 1913, all petty crimes, Indian or otherwise, have been prosecuted in its City Court. The United States Attorney appearing herein has presented the administrative view that New York State has jurisdiction, citing U. S. v. McBratney, 104 U. S. 621, and Draper v. United States, 164 U. S. 240. The administrative view and the de facto jurisdiction assumed by the New York courts, while not controlling on this decision, should be accorded great weight, having existed a long period of time without any congressional change. See: U. S. v. American Trucking Assns., 310 U. S. 534.

In view of the foregoing, I hold that Congress has not prescribed exclusive federal jurisdiction over the acts herein for which petitioner has been convicted, and I conclude that New York State law controls unless and until Congress passes legislation superseding it.

Petitioner contends that the rule of U. S. v. Forness, 125 F. (2d) 928, is determinative here. The decision in that case was that Congress having enacted laws with respect to Indian leases in Salamanca, New York State law with respect to leases was superseded. Such is the holding of the Second Circuit, and this opinion is not in conflict therewith. My holding is that Title 25, Sec. 217, U. S. C., does not extend the general criminal laws over the City of Salamanca.

As a result, the state law of New York applies, and the courts of that state correctly and properly assumed jurisdiction in the judgment and sentence of petitioner, and I hold that the motion and petition for the writ of habeas corpus must be denied.

In view of the foregoing, it is unnecessary to decide whether or not petitioner, by failing to raise the question of jurisdiction in the prior proceedings, has waived his right to do so now.

July 12, 1943.

JOHN KNIGHT,
United States District Judge.

Filed: July 19, 1943.

APPENDIX "B"

Opinion of the Circuit Court of Appeals, Second Circuit

141 Fed. 2nd 218.

FRANK, Circuit Judge:

Relator-appellant was convicted and sentenced in the Supreme Court of Cattaraugus County, New York, to life imprisonment for murder of a man, in the City of Salamanca, New York, which lies within the Allegany Indian Reservation, all the land within the City of Salamanca being leased from the Seneca Nation. Relator-appellant is not an Indian, nor was the murdered man. The conviction was affirmed in the Appellate Division of the New York Supreme Court; leave to appeal to the Court of Appeals of that State was denied. In the proceedings in the State Court, relator-appellant did not raise the question of jurisdiction. He made no application for a writ of habeas corpus in the State Court, but applied for such a writ in the court below. Relying largely on our decision in United States v. Forness, 125 F. (2d) 928, he asserted that, under the federal statutes and treaties with the Seneca Nation, the State court had no jurisdiction whatsoever of a trial for murder occurring in Salamanca. The court below made an order denying the application for the writ. From that order relator appellant appeals.

We agree with the contention made by the State of New York, through its Attorney General, and by respondent, that the application for a writ to a federal court was prematurely made. Save in most exceptional circumstances, the writ will not issue if the relief sought is from the judgment of a State Court where the petitioner has not exhausted his remedies in the State Court and has not shown that the State court will not, or cannot, do justice.[1] There is no

[1] Ex parte Abermathy et al., 64 S. Ct. 13; United States ex rel. Kennedy v. Tyler, 269 U. S. 13, 17; Mooney v. Holohan, 294 U. S. 103, 115; Urquhart v. Brown, 205 U. S. 179; ex parte Royall, 117 U. S. 241; Davis v. Burke, 179 U. S. 399, 403; New York v. Eno, 155 U. S. 89; United States ex rel. Lesser v. Hunt, 117 F. (2) 30, 31 (C. C. A. 2); United

showing whatever here that justice will be denied in the State Court, and none of the exceptional circumstances, noted in the cases cited, here exist.

Affirmed.

CLARK, Circuit Judge (concurring):

I concur in the decision herein on the ground stated in the opinion, as well as upon the additional and alternative ground also relied upon by the District Court, July 19, 1943, F. Supp.

APPENDIX "C"

Opinion of County Judge Denying Writ

(181 Misc. 985)

The relator was indicted by a grand jury of the County of Cattaraugus for the crime of murder in the first degree alleged to have been committed September 16, 1939, in the City of Salamanca in said County. He was convicted upon the second count of the indictment which charged a killing by the relator while engaged in the commission of a robbery. Upon this conviction he is now confined in the Attica State Prison for life. The relator is, and the deceased was, a white man. The relator now claims in this proceeding that this imprisonment is illegal, that the judgment of conviction is void, that the crime was not cognizable by the laws of the

---

States ex rel. Murphy v. Murphy, 108 F. (2d) 861, 862, (C. C. A. 2); Hawk v. Olson, 130 F. (2) 910 (C. C. A. 8, Cert. den. 317 U. S. 697); Jones v. Dowd, 128 F. (2d) 331 (C. C. A. 7); Sanderlin v. Smith, 138 F. (2d) 729 (C. C. A. 4); Johnson v. Wilson, 131 F. (2d) 1 (C. C. A. 5); Stonefield v. Buchanan, 124 F. (2d) 23 (C. C. A. 6).

The circumstances justifying the issuance of a writ in such cases must be far more exceptional than those which would justify the issuance of the writ where the relief is sought from the judgment of a federal court. See, e.g. In re Lincoln, 202 U. S. 178, 182; New York v. Eno, 155 U. S. 89-96-98 (explaining In re Loney, 134 U. S. 317); Sanderlin v. Smith, 138 F. (2d) 729, 731 (C. C. A. 4). Accordingly, cases like Bowen v. Johnson, 306 U. S. 19 are not pertinent here.

State of New York but was solely within the jurisdiction of the Federal Courts. An appeal from the judgment of conviction was taken to the Appellate Division of the Supreme Court where it was affirmed. Leave to appeal to the Court of Appeals has been denied. Neither upon the trial nor in the appellate courts was any question of jurisdiction raised.

The locus of the crime has never been in dispute. The question of jurisdiction is purely a legal one based upon facts undisputed in the record.

The relator petitioned for a writ of habeas corpus to the United States District Court for the Western District of New York. His petition was there denied upon an opinion of Honorable John Knight, United States District Judge, filed July 19, 1943, upon the ground, first, that the petitioner could not invoke the jurisdiction of a Federal Court upon a writ of habeas corpus until he should have exhausted his remedies in the State Court, citing Jones vs. Dowd, 128 F. 2nd 331, and Mooney vs. Holohan, 294 U. S. 103. Secondly Judge Knight held that the penal laws of the State of New York governed the acts for which this relator was convicted and that the Supreme Court of the State of New York had jurisdiction to try and convict.

This decision was appealed to the Circuit Court of Appeals where it was affirmed, Judge Jerome Frank writing the opinion of the Court, upon the sole ground that the application was made prematurely since the petitioner had not exhausted his remedies in the State courts. The majority of the court refrained from expressing any opinion upon the issue as to whether the State Court had jurisdiction, but Judge Clark in an opinion concurred upon the additional and alternative ground that the New York Supreme Court had jurisdiction.

We have here a question which ultimately must be passed upon by the Federal Courts. The statutes we are asked to construe are Federal statutes. Nearly all the authorities cited are decisions of Federal Court, but those Courts seem to be inhibited from deciding the matter unless and until the State courts shall have proven that they "will not or cannot do justice." The result is that the question is presented initially to this Court.

In attempting to decide the issue before us we are indebted and accord great weight to the opinions expressed by United States District Judge Knight and Judge Clark of the United States Circuit Court of Appeals. The briefs furnished us by the respective counsel are most interesting as examples of research and learning along lines both legal and historical.

The question which we are to attempt to decide, as had been indicated, is whether the penal laws of the State of New York as to a non-Indian charged with murder of another non-Indian, within the confines of the City of Salamanca apply, or whether such a crime is solely within the purview of Federal law.

CHAPTER 11 OF TITLE 18 OF THE U. S. CODE provides a complete system of penal statutes as applying to (Sect. 451, sub. 3):

> "lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard or other needful building."

Section 468 adopts by reference the definitions of and punishments for acts not made penal by any act of Congress but defined and punished by the laws of the State in which such lands are located. Such acts in such territory are, nevertheless, crimes under Federal law and ordinarily to be prosecuted in Federal Courts.

> Puerto Rico vs. Shell Co., 302 U. S. 263-P. 266, citing U. S. v. Press Publish. Co., 219 U. S. 1, Franklin vs. U. S. 216 U. S. 559.

Section 452 specifically defines as murder the acts of which this relator was convicted. It is not seriously contended that the City of Salamanca explicitly comes within this or the other subdivisions of said section.

Chapter 6 of Title 25, U. S. Code (the section of the Code relating to Indians) defines and prescribes the punish-

ment for certain crimes committed by white men and by Indians within the Indian country under certain conditions.

Section 217 of said Chapter provides as follows:

> "Except as to the crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

The serious contention made by the relator here is that this section, 217, extends the provisions of Section 452 of Chapter 11 of Title 18 of the Criminal Code to a murder committed by one white man upon another within the City of Salamanca and that the City is "Indian country" under the meaning of said Section 217. In claiming that the New York Supreme Court lacks jurisdiction he seems to rely upon certain language in the case of ex parte Crow Dog, 109 U. S. 556, and similar cases, to the effect that all of the lands in the United States to which the Indian titles have not been extinguished are "Indian lands." He relies particularly upon certain extracts from the opinion of Judge Jerome Frank in United States vs. Forness, 125 Fed. 2nd 928.

THE FEDERAL CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3, gives the Congress power

> "to regulate commerce with foreign nations, among the states, and with the Indian tribes."

To an increasing extent both the tribes and the individuals within the tribes have been regarded as the wards of the Federal Government. The power of Congress has been implied to extend as to Indians, to crimes committed by them and against them and also to their dealings with non-Indians, whether within the Eastern States where title was originally in the states or in the Western states where title was originally in the United States.

See People ex rel. Cusick vs. Daley, 212 N. Y. 183;
People ex parte Crow Dog vs. The U. S. 109 U. S. 556;
U. S. vs. Kagama, 118 U. S. 375.

See also U. S. vs. McBratney, 104 U. S. 621 and Draper vs. U. S., 164 U. S. 240.

As illustrating the extent to which the Federal Government may impose its authority for the benefit of its wards, the Indian title has been extinguished, reference is made to the case of Browning vs. U. S., 6 Fed. 2nd 801; certiorari denied, 46 U. S. Supreme Court 25.

It seems clear that if the Congress has intended that the criminal laws of the United States shall extend over non-Indians in the City of Salamanca, its intention must prevail. From the spirit of statute and decisional law such extension would seem to be based less upon whether the title of the Indians to the territory involved may or may not have been completely extinguished, than whether the interests and welfare of the Indians as wards of the United States are involved.

It is argued that under the language of Ex Parte Crow Dog, cited above, and other cases, the term "Indian Country" as used in said statute applies to the Seneca Reservation, but the question to be decided here is more strictly limited.

If by the enactment of the Act of Congress of February 19, 1875, C. 90, 18 Statutes at Large 330, the Congress intended to permit extension to the villages therein provided for, of the criminal laws of the State of New York, and to remove such villages from the category of "Indian Country" then, for that purpose, said Section 217 and Chapter 11 of Title 18 of the U. S. Criminal Code do not apply to non-Indians within the City of Salamanca.

Said Act of 1875 is set forth in the annotations to Section 71 of the Indian Law in McKinney's Consolidated Laws of the State of New York.

It is evident that following the passage of this Act the surveys provided for were made, defining the limits of the villages, including Salamanca. Leases of a large part of the territory for twelve years, were negotiated in 1880. Chapter 188 of the Laws of 1881 of the State of New York, now Section 71 of the New York State Indian Law, was passed. Later, the Congress by the Act of September 30, 1890, enacted that the leases might be renewed for a further term

of ninety-nine years subject to all of the other terms and conditions of said Act of 1875. While this did not completely extinguish the Indian titles, it did seem to provide for non-Indian occupancy and control, probably permanent. The City of Salamanca was organized in 1913 and now substantially all of the land in the City is occupied under said ninety-nine year leases, by non-Indians. The New York Legislature passing said Section 188 of the Laws of 1881 referred to the Act of Congress of 1875, adopted much of the language of that Act but provided that

> "all of the general laws of the state are extended over and apply to the same," (said villages).

Evidently this was the contemporaneous understanding of the New York Legislature as to the effect of the Act of Congress. The Supreme Court of the State of New York, the County Court of the County of Cattaraugus, the Justices of the Peace of the Town in which the former Village of Salamanca was located, and since the establishment of the City, the City Court, have all exercised criminal jurisdiction over non-Indians within the City of Salamanca. Over the past period of upwards of sixty years their jurisdiction seems not previously to have been questioned.

The case of Ex Parte Crow Dog, supra, is not an authority here; that case involved the murder of an Indian by another Indian on a reservation. The case of United States vs. Forness was a suit brought to enforce cancellation of certain leases made by the Seneca Nation upon lands in the City of Salamanca where the lessees had persistently defaulted in paying the rentals. The issue decided by the case is that such controversies between the Indians, who are the peculiar wards of the Federal Government, and lessees of lands in the City leased pursuant to the Act of Congress, are subject to the Federal laws and not to the laws of the State of New York. The crux of the decision is in the words,

> "but state law cannot be invoked to limit the rights in lands granted by the United States to the Indians * * * State law does not apply to the Indians except so far as the United States has given its consent."

There are certain statements in Judge Frank's opinion which the relator believes are favorable to his contention. These we will refer to later. We believe them to be obiter dicta. In the case before us, the murder of a white man by another white man in a city of white men, no consideration particularly affecting the interests or welfare of the Indians is involved. The sole question is whether the white inhabitants of the City of Salamanca are subject to the State or Federal criminal law and within the jurisdiction of the State or Federal courts. The question seems finally to be determined by the interpretation to be put upon the phrase,

> "and all municipal laws and regulations of said State may extend over and be in force within said villages:".

In interpreting this phrase it seems necessary, at the risk of seeming tedious, to analyze the spirit and purposes of said Act of Congress of 1875.

Section 1 of the Act, validated leases formerly made to railroad companies. These leases we understand had been made by supposed authority of State statutes but had been held unauthorized.

> See Buffalo Railway vs. Lavery, 75 Hun. 396;
> Ryan vs. Knorr, 19 Hun. 540.

Here the State had attempted ineffectively to legislate concerning relations between white men and Indians.

> But see New York Ex Rel. Cutler vs. Dibble, 62 U. S. 149, and
> U. S. Ex Rel. Kennedy vs. Tyler, 269 U. S. 13.

Section 2 authorized the appointment of commissioners to locate proper boundaries for Salamanca and other villages including as far as practicable

> "all lands now occupied by white settlers and such other lands as in their opinion may be reasonably required for the purposes of such villages."

The villages, then, were to be villages of white men and not Indians.

Section 3, in general provided for the making of twelve year leases (later legislation providing for 99 year leases)

to be perpetually renewed as provided in the Section by arbitration between the non-Indian lessees and the Indians as lessors.

Section 4 authorized the Seneca Nation to lease lands not belonging to individual Indians, to make such leases as might be authorized by the resolution of its councilors in accordance with the laws and system of government of the Seneca Nation.

Section 5, provided for recording of the leases in the Office of the Clerk of Cattaraugus County and made them subject to the recording laws of the State of New York. It provided that the rights of the lessees (non-Indians) should pass by assignment, will, descent or otherwise as provided by the laws of the State of New York but that the rights of the Indians in such leases should descend as provided by the laws of the Seneca Nation. This section appropriately makes matters of concern to non-Indians subject to white men's law and matters of concern to Indians only, subject to Indian law. Potential conflicts between Indian lessors and the lessees involving forfeiture of leases and the like, are, since the Indians have a degree of sovereignty and are the wards of the Federal Government, extra-mural matters so far as the laws of the State of New York are concerned. Such matters are subject to the laws of the United States.

Matter of Forness, 125 Fed. 2nd 928.

Section 7 of the statute attempts to give jurisdiction both to the courts of the State of New York and to the U. S. Courts, probably as a matter of convenience, as to actions for rents, recovery of real property etc. within the villages. This Section is not inharmonious with the spirit of the whole statute as we interpret it. It perhaps was not then understood that, on account of the Federal guardianship of the Indians, a special body of law might develop as to leases made with them, and their enforcement, other than that prevailing generally in the locality where the lands were situated. The Congress could not have anticipated the Forness case, which pioneered the law in this regard some sixty-five years later.

Section 8 recognizes that highways extending through the villages and to other parts of the reservation are mat-

ters of concern both to the inhabitants of the village and to the Indians on the reservation outside the village. It provides that all the laws of the State of New York concerning highways and bridges shall apply within the villages and, with the consent of the Seneca Nation and Council, may extend to and be "in force beyond said villages in said reservation or in either of them."

Hereafter occurs the phrase we have quoted above:

> "; and all municipal laws and regulations of said state may extend over and be in force within said villages; provided nevertheless that nothing in this section shall be construed to authorize the taxation of any Indian or the property of any Indian not a citizen of the United States."

In determining the meaning of the phrase "all municipal laws and regulations of said state," we are permitted to and should consider the purpose and spirit of the entire act in which it occurs. We should ascribe to it a meaning in harmony with its context, not the meaning which gives it "the least possible sense" in that context.

The learned Assistant Attorney-General in his brief points out that in early texts, more generally read in 1875 than now, the term "municipal law" was often used as referring not merely to the laws relating to municipal corporations but to the laws generally of a state or nation applying to its internal affairs, contra-distinctive to international law or laws having to do with extra-mural matters or relationships. He cites Blackstone's Commentaries with notes by T. M. Cooley, 2nd ed., Chicago, 1872, Book 1, Sec. 2, Page 43, as follows:

> "Thus much I though necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations, are governed * * *. 'I call it municipal law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single municipium or free town, yet

it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.' Municipal law, thus understood, is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'"

Also Ken't Commentaries, 12th edition, edited by O. W. Holmes, Jr., published in 1873, Part III, Page 507:

"Municipal law is a rule of civil conduct prescribed by the supreme power of a state. * * *. Municipal law is composed of written and unwritten, or of statute and common law. Statute law is the express will of the legislature, rendered authentic by certain prescribed forms and solemnities."

Also Bouvier's Law Dictionary, 11th ed. Phila. 1862.

"Municipal. Strictly, this word applies only to what belongs to a city. Among the Romand, cities were called municipia; these cities voluntarily joined the Roman republic in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were thence called municipal magistrates. With us this word has a more extensive meaning; for example, we call municipal law, not the law of a city only, but the law of the state. 1 Bl. Com. Municipal is used in contra-distinction to internationa; thus we say an offense against the law of nations is an international offense, but one committed against a particular state or separate community, is a municipal offense."

Also "Lectures Introductory to the Study of Law," George Sharswood, Philadelphia 1870:

"Natural jurisprudence includes in its survey topics which belong both to Municipal and International Law; that is, both the system of rules which governs a state internally, which we term Municipal Law, and that system by which it is regulated in the intercourse and relations with other states, which we call International Law."

Also "Introduction to American Law" by Professor Timothy Walker, 6th ed., Boston 1874, Page 47:

> "The grand design of this government would be to unite the people of the several states into one nation for national purposes only; and accordingly for all municipal purposes, each State would still retain its former government, divested, however, of the attributes of complete national sovereignty. * * * Suffice it to say, that each citizen would now owe obedience to two distinct governments, one national and the other municipal * * *."

To these citations might be added the third definition of the word "municipal" as given in Webster's International Dictionary, 2nd ed.:

> "3. Municipal. Of or pertaining to the internal or governmental affairs of a state, kingdom or nation—used chiefly in the phrase 'municipal law.'"

This view of the meaning of the statute was evidently presented to the Federal Courts in the case of U. S. vs. Forness. It seems to us that it should be accorded greater consideration than it received there. In the District Court Judge Knight was of the opinion that the words municipal laws "were intended to apply only to the State laws for the government and control of villages." If the term were intended to be so limited, it does not seem that the statute is appropriately worded. In their restricted sense "all the municipal laws of the State of New York" would include not only the Village Law but the Town Law, and the County Law, and the General Municipal Law, as well as laws relating to cities and districts of various sorts. Prior to 1874 a great many villages had been set up under special acts of the Legislature. The site of the Village of Salamanca was located within the County of Cattaraugus and also within the boundaries of the Township of Salamanca as well as being part of the Indian reservation.

In the Circuit Court of Appeals Judge Frank dismissed the contention as follows:

> "When, as in the statute, the 'laws' of a state of the Union are under discussion, there can be no intelligent

reference to its international or extra-mural laws for it has none under our Federal Constitution. Appellee's construction would, in effect, read the word 'municipal' out of the statute. 'Municipal laws' of such a state can have but one reference, i.e., the laws of its municipalities. The meaning is the same as when we speak of the 'Municipal Building' of the City of New York."

However, as is stated on Page 1413 of Volume 42, Corpus Juris, the adjective "municipal" is

> "more elastic in its meaning, than the word 'municipality' or even than the term 'municipal corporation,' variously defined as, belonging to a city, town or place having the right of local government, belonging to or affecting a particular state or separate community * * *. The term is sometimes used in contra-distinction to 'international' * * *. It has a broader meaning, a more extensive or extended meaning, and is in legal effect the same as public or governmental as distinguished from private."

See also cases there cited.

As to the statement that the State of New York can have no international or extra-mural laws, it would seem that in a sense a state may have and does have laws affected with an interest outside of the concerns of its own citizens and even outside its own boundaries. Then, too, the phrase is properly used in contra-distinction to laws of the Federal Government which define relations of the State and its citizens under the Constitution, with other States of the Union and their citizens. We have seen that in 1836 New York State had legislated to authorize Indian leases to railroads, but that the courts had failed to uphold them.

Ryan vs. Knorr, 19 Hun 540.

The statute under consideration, even in its narrower sense, would permit state legislation governing certain relations with the Indians in whom a separate sovereignty is recognized. The statute is legislation which, passed by the State legislature with the consent of Congress, would have an extra-mural significance.

It would seem to us that if the term "all municipal laws and regulations of said state" is to be limited narrowly to mean all of the Village Laws, or even all laws relating only to municipal corporations, the legislation would be inept and ineffectual to accomplish anything but an unworkable and confused result.

The Village Law of 1870 provided for police and police justices within villages. The police justices were vested with the same jurisdiction in civil and criminal matters as justices of the peace. The act further provided that the justices resident in a town where a village was located should have within the village the same civil and criminal jurisdiction which they might exercise outside the village. The question may be asked "What criminal law was it intended these officers should administer"? Were village police and police justices to administer the village ordinances and the Federal laws? Where would appeals from the decisions of the police justice and the justices of peace be heard? The Town Law gave criminal jurisdiction to Justices of the Peace. The County Law provided for Sheriffs. Federal Law is administered by United States Commissioners and the Federal Courts, and mandates are executed by United States Marshals. Many questions of this sort suggest themselves. It does not seem likely that the Congress could have intended to pass a statute designed to effect legal chaos in the Village or City of Salamanca.

On the other hand it seems that if the broader significance is to be given to the term "all municipal laws and regulations of said State," the statute is understandable and workable. Such meaning seems in harmony with the general purpose and intention of the act. Used in this sense the word "municipal" was most appropriate. If the word "municipal" were to be eliminated, the phrase would be appropriate no longer. It was not, as it seems, intended that all the laws and regulations of the state might extend over and be in force in said villages. If the statute had so read it would have been arguable that it authorized other laws, such as had been previously attempted, regulating relations with the Indians. It would have seemed to permit the State to invade a field intended to be reserved to the Federal government as guardian of the Indian tribes.

If the Congress intended, as we apprehend it did, to pass a statute establishing the villages of non-Indians on the reservation, permitting the laws of the State of New York to govern them so far as their own affairs were concerned, leaving matters purely Indian for regulation according to the institutions and customs of the Indians, but preserving to the Federal government its rights and duties towards its wards the Indians where matters might arise affecting their welfare, we can think of no simple phrase which could have been used so aptly as the phrase "municipal laws and regulations," understood in its broader sense.

The fact that in the year 1881 after this Act of Congress was passed and after the surveys had been filed and the leases made, the legislature of the State of New York passed an Act indicating an understanding that the general laws of the State of New York should apply to the villages in question, would seem to be an argument of some weight in favor of the interpretation we are adopting. The facts that for upwards of sixty years the State courts have assumed jurisdiction of criminal matters affecting while people in the City of Salamanca, and that during that period the Federal authorities have disclaimed and down to the present still disclaim jurisdiction, are also arguments that the interpretation suggested was intended by the Congress. As Judge Knight has pointed out, in the construction of a statute of this kind the administrative view is entitled to great weight. He cites U. S. vs. American Trucking Association, 310 U. S. 534.

Where a statute is susceptible of more than one interpretation, contemporaneous and long continued administrative interpretation of it is especially persuasive. See annotations 73 U. S. S. C. Law Ed. 322 and Voll. 84 Law. Ed. 28.

We conclude that the Act of Congress of February 19, 1875, permitted the extension of the penal laws of the State of New York to crimes committed by non-Indians within the City of Salamanca, and that said City is not Indian country within the meaning of Section 217, Chapter 7 of Title 25 of the U. S. Code. The Supreme Court of the State of New York had jurisdiction to try and convict the relator and he is

held by virtue of a judgment of a court of competent jurisdiction. An order should be entered dismissing the writ and remanding the relator to the custody of the Warden of Attica State Prison.

APPENDIX "D"

Opinion of the Appellate Division, Fourth Department

(268 A. D. 218)

CUNNINGHAM, P. J.:

The relator was indicated by a grand jury of Cattaraugus County for the crime of murder in the first degree. One of the counts of the indictment charged that the murder was committed by the defendant while he was in the act of committing a felony. It was upon this count that the defendant was found guilty by a jury after a trial in the Supreme Court of Cattaraugus County. The jury recommended life imprisonment and, thereafter on December 15, 1939 the defendant was sentenced to be confined in Attica State Prison for the term of his natural life.

The conviction of relator was appealed to this court and was affirmed. The question of jurisdiction was not raised upon the trial or upon the appeal to this court. After the sentence the relator applied to the United States District Court for a writ of habeas corpus. This was denied by Judge Knight, United States District Judge, upon the ground that such writ could not be allowed until relator had exhausted his remedy in the state courts and upon the further ground that the Supreme Court of the State of New York had jurisdiction to try and convict him. Upon appeal to the Circuit Court of Appeals, Judge Knight's decision was affirmed upon the ground that the relator was not entitled to a writ until it became apparent that the state courts would not or could not do justice. The question of the jurisdiction of the State Supreme Court was not passed upon. Application was then made to a state court—the County Court of Wyoming County—for a writ of habeas corpus, the relator claiming that the crime was com-

mitted on Indian lands; that the state courts did not have jurisdiction to try him for such crime and that his trial should have been had in a federal court. The appeal now pending before us was taken from the order of the Wyoming County Court which denied such application.

The relator is a white man and the murdered man was a white man.

It is conceded that the place where the crime is alleged to have been committed is in the City of Salamanca, which is within the original limits of the Allegany Indian Reservation.

The relator relies upon Section 217, Title 25, U. S. C., reading as follows:

> "Except as to crimes punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

The lands in the City of Salamanca are mostly occupied by white people, but the Indians still hold the title to them. However, the Indians have been permitted by act of Congress to lease the lands now included in the City of Salamanca to the people who now occupy them for a term of ninety-nine years, with the right of renewal given to each lessee. (City of Salamanca v. United States, 125 Fed. (2d) 928; Certiorari denied 316 U. S. 694). The Indians have parted with their right to use and occupy the lands in the City of Salamanca and have passed the control thereof to the lessees.

Lands which are used and occupied by white persons under a grant of the Indian owners are not, in our opinion, Indian lands within the meaning of the statute relating to Indian lands. The term "Indian Lands" applies only to lands owned by Indians and occupied and used by them. (United States v. Chavez, 290 U. S. 357.)

In the early days of this country the various Indian tribes were regarded as foreign nations, and regulations for their welfare and protection and for the protection of their property were made through treaties negotiated between

each tribe and the United States. In subsequent years the theory that each Indian tribe was a foreign nation was discarded and the Indians were regarded as wards of the United States, and protection to them and their property was given by acts of Congress and they became subject to the regulations contained in such acts.

For many years this state has held in decisions of its courts and in laws enacted by its Legislature that it had jurisdiction to try Indians for crimes committed against other Indians or their property whether on Indian lands or on other lands in the state. As late as July 1913, the Appellate Division of this department unanimously affirmed an order of the Supreme Court of Niagara County, holding that the Supreme Court of this state had jurisdiction to try an Indian for a crime committed upon the person of another Indian within the boundary of the reservation on which both lived. (People ex rel. Cusick v. Daly, 78 Misc. 657; affd. 158 App. Div. 892). However, this decision was reversed by the Court of Appeals which held that the power of the state must yield to the paramount authority of the federal government and that under the statutes of the United States the power to try the defendant in that case was vested in the federal courts. (People ex rel. Cusick v. Daly, 212 N. Y. 183.) This decision does not apply in the case at bar because the jurisdictional facts in the cited case and in this case are entirely different. In the cited case the crime was committed upon an Indian reservation the lands of which were owned by an Indian tribe and were used and occupied by Indians. Furthermore, the crime was committed by an Indian upon the person of another Indian, both of whom were wards of the United States. In the case under consideration the crime was not committed upon lands used and occupied by Indians and was committed by a white man upon the person of another white man.

We believe that the section of the United States Statutes relied upon by the relator does not apply to a crime committed by one white person against another. This statute was passed to provide for the punishment of crimes committed by Indians on Indian lands and applies to crimes committed by white persons on Indian lands against In-

dians on their property, but does not apply to a crime committed by a white person against another white person even though committed on Indian lands. The federal courts do not have jurisdiction to try white citizens of the various states for crimes not committed against the federal government or against the wards of the federal government. This is so even though the crime is committed on Indian lands. (United States v. McBratney, 104 U. S. 621; United States v. Bailey, 1 McLean 234.)

The order appealed from should be affirmed, without costs.

APPENDIX "E"

Opinion of the Court of Appeals, State of New York

415—New York Opinion—(Vol. 294)—3228

THE PEOPLE OF THE STATE OF NEW YORK EX REL. DONALD A. J. RAY, *Appellant*,

against

WALTER B. MARTIN, as Warden of Attica State Prison, *Respondent*. (294 N. Y. 415) (Unpublished)

Decided March 1, 1945

APPEAL, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 27, 1944, which unanimously affirmed an order of the Wyoming County Court (Conable, J., opinion 181 Misc. 925) dismissing a writ of habeas corpus and remanding relator to the custody of respondent, as warden of Attica State Prison.

Thomas J. McKenna, James B. McKenna and Benjamin Galperin for appellant.

Nathaniel L. Goldstein, Attorney-General (Henry S. Manley, Orrin G. Judd and Wortley B. Paul of counsel), for respondent.

Beverly S. Galloway, Assistant District Attorney, Cattaraugus County.

ESMOND, *J.*:

Relator is serving, in a New York State Prison, a life ntence imposed on him by the Supreme Court of the State New York on December 15, 1939, for the commission, at e City of Salamanca, in Cattaraugus County, New York, a "felony murder" (Penal Law, Sec. 1044, Subd. 2, Sec. 45-a). Almost the whole of the City of Salamanca, includg the scene of the killing, is within the bounds of the Algany Reservation of the Seneca Nation of Indians. Relator is not an Indian, nor was his victim, one Paul Balsiger. this habeas corpus proceeding relator asserts that the upreme Court of this State was without any jurisdiction of s offense, committed as it was on an Indian reservation. o such challenge to the jurisdiction was made during lator's trial or on his appeal to the Appellate Division from e judgment of conviction, which appeal resulted in an firmance by that court (259 App. Div. 1065), or on a subequent motion, denied by a Judge of this court, for leave appeal to this Court. We hold, nonetheless, that the alged jurisdictional question may properly be raised by ese habeas corpus proceedings. (See People ex rel. Carr Martin, 286 N. Y. 27, 31, 32.) Special Term and the ppellate Division, fourth department, both wrote opinns (181 Misc. 925 and 268 App. Div. 218) in dismissing the rit. We granted leave so that we might, if possible, set rest any doubts as to whether the Penal Laws of this tate apply to crimes committed in the city of Salamanca. he respective counsel have furnished us with extensive eviews of the writings on the very large subject of the risdiction of tribal, Federal and State courts over Indian servations in the United States. We content ourselves ith a statement of the bases for our conclusion that relator as properly indicted, tried and punished in the Supreme ourt, despite the undoubted fact that the crime was comitted on lands which form part of an Indian reservation. general, our reasons for that conclusion are these: that ere is no basis in any treaty, Constitution or statute for an sertion by the Federal government of exclusive jurisdicn over crimes committed by non-Indians against nondians on this reservation, that such jurisdiction has his-

torically, by common consent and for sound legal reasons been assumed to exist, by the Federal and State courts in New York and elsewhere, that this is peculiarly so as to the reservations of the "Six Nations" in New York State, and, finally, that there is a Federal statute making applicable to the city of Salamanca the general laws of the State of New York.

The Allegany reservation of the Seneca Indians is wholly within New York State, has an area of about forty-two square miles and extends along both sides of the Allegany River, north from the Pennsylvania border. It is a part of the much more extensive lands occupied by the Seneca nation before the American Revolution. Before our Federal Constitution was adopted, those Seneca lands were within the bounds of the State of New York. The Allegany reservation was, accordingly, not created by the Federal government out of United States government lands within the State, and was never at any time territory of the United States. (Seneca v. Christie, 126 N. Y. 122, 136, affd. 162 U. S. 283.) During colonial days there had been a protracted quarrel between New York and Massachusetts over a large territory (several million acres) including much of present-day western New York, each colony claiming that its royal charter gave it sovereignty and jurisdiction over the disputed tract. In 1786, after the Declaration of Independence but before the adoption of the Federal Constitution, a compact was entered into between the sovereign States of Massachusetts and New York by the terms of which compact New York was recognized as having sovereignty and jurisdiction over the lands and Massachusetts was recognized as the owner of the "right of preemption" of the lands themselves, including the right to extinguish such title as the Indians had. This compact, subsequently ratified by the Congress of the United States, authorized Massachusetts to grant and convey the right of pre-emption, as to any part of the lands involved, "to any person or persons, who by virtue of such grant, shall have good right to extinguish by purchase the claims of the native Indians * * *". Massachusetts in 1791 conveyed its title, subject to the Indian claims, to Robert Morris, who later conveyed it to the Hoiland Land Company, Morris agreeing to ex-

tinguish the Indian rights at his own expense. He did so in 1797 when at a great council of the Senecas held at Geneva, New York, he received from the Seneca Nation a conveyance of all the lands purchased by him from the State of Massachusetts, excepting certain Indian reservations, including the Allegany reservation with which we are here concerned. The council was held and the conveyance made with the approval of the government of the United States, as represented by its Commissioner. (See discussions of these transactions in Seneca v. Christie, supra, and Jemison v. Bell, 186 N. Y. 493, 497.)

Previously to the Geneva Council, and in 1794, there had been entered into at Kon-on-daigua (Canandaigua, N. Y.) a treaty between the United States of America and "the Tribes of Indians called the Six Nations" (including the Seneca Nation). By it "peace and friendship" were to be "firmly established" forever, between the United States and the Six Nations. The treaty contains a description by metes and bounds of the lands of the Seneca nation, with an acknowledgment by the United States that the described lands were the property of that nation, and a promise by our government that the possession thereof by the Senecas would never be disturbed. The Senecas, on their part, covenanted that they would never claim any other lands within the boundaries of the United States. By Article V the Senecas ceded to the United States the right to build a wagon road through part of their lands (not the Allegany reservation) and the right of free passage through all the Seneca lands. Article VII of that Treaty of 1794 is one of relator's main reliances. By that article it was stipulated that, "lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, * * * for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured to the other". If the depredation was by Indians, the complaint was to be made by the President, or a superintendent by him appointed, to the principal chiefs of the Six Nations or any of them; if the "private injury" was by whites, then the complaint would go from the Indian nation to the

President, or his superintendent. Upon the entry of any such complaint, says article VII, "such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken until the legislature (or great council) of the United States shall make equitable provision for the purpose". Relator treats that last-quoted sentence as "provision for future federal legislation which would cover the crime in question when committed within the Allegany reservation". He says that the language "expressly excluded State laws from application to this reservation". We cannot agree that it had any such meaning or effect, or that it referred at all to the question of what system of internal law should thereafter operate within the tribal lands. The treaty was, in substance as well as form, a true treaty, made between the United States of America and the quasi-sovereign Six Nations. It was made not to set off lands to the Indians or to provide for their government, but as a treaty of peace to put an end to a state of war and guard against its recurrence. For this purpose, border raids or other incursions were to be treated as "international incidents", and diplomatic representations thereupon were to be made by the aggrieved signatory to the other. The Treaty of 1794 was one of a long series of actual treaties made between the United States and Indian tribes until the practice was abolished in 1871. (See Seneca v. Christie, supra; Turner v. American Baptist etc., 5 McLean 344, 349; United States v. Whiskey, 93 U. S. 188.) It did not create any Indian reservation but confirmed the Senecas' aboriginal right of possession. (See United States v. Santa Fe, 314 U. S. 339.) Nothing in the language of the pact, the circumstances giving rise to it, or the history of proceedings under it, furnish reason for holding that it had anything to do with the future domestic government of the reservation or that the reference to "the legislature or great council of the United States" in itself conferred on Congress any power of any sort to legislate as to such matters. If such a meaning had been intended, appropriate language was available. (See, for instance, treaty provision quoted in United States v. 43 Gallons whiskey, supra, 93 U. S. at p. 193.)

Of course, Congress had, from other sources, jurisdiction over the Indians and their lands and their affairs. By Federal Constitution provision (art. 1, Sec. 8) and perhaps ex necessitate (See Board v. Saber, 318 U. S. 705, 715), the Indian tribes have always been to some degree dependents of the government of the United States and their members have been wards of that government, receiving its care and protection. (United States v. Kagama, 118 U. S. 375; United States v. Sandoval, 231 U. S. 28; United States v. Klamath, 304 U. S. 119.) The power of Congress over the Indians and their tribal affairs and domains is paramount and of a most sweeping character. (Worcester v. Georgia, 31 U. S. 515.) The courts of this State, as well as the Federal courts, have consistently recognized that this paramount power in Congress is applicable to the affairs of the Six Nations within New York State. (People ex rel. Cusick v. Daly, 212 N. Y. 183, 196; Mulkins v. Snow, 232 N. Y. 47, 51; United States ex rel. Kennedy v. Tyler, 241 U. S. 556, affg. 294 F. 111.) But, while the tribal Indians, being wards of the national government, are not generally amenable to State laws nevertheless the lands in any State occupied by Indians is still part of the State unless expressly excluded therefrom. (See Thomas v. Gay, 169 U. S. 264, 274, 275; Utah v. Fisher, 116 U. S. 28.) The exclusive control of the Federal government over Indians extends only so far as is required by the pupilage of the wards and has to do only with government and protection of the Indians themselves. (Utah v. Fisher, supra.) Congress may exercise that jurisdiction by legislating concerning crimes committed by Indians or against Indians within a reservation. (Donnelly v. United States, 228 U. S. 243.) But that jurisdiction over the Indians has nothing at all to do with the transactions of white men among themselves not affecting the persons or property of Indians, on or off a reservation. Accordingly, it has been held in many State and Federal decisions, and apparently never until now questioned, that to oust the criminal courts of a State from jurisdiction over crimes committed by a non-Indian against a non-Indian, more must be shown than the single fact that the crime was committed on an Indian reservation. (See Donnelly v. United States, supra; United States v. McBrat-

ney, 104 U. S. 621; State v. Monroe, 83 Mont. 556; People v. Pratt, 26 Cal. App. 2d 618; State v. Lindsay, 133 Wash. 140; State v. Adams, 213 N. C. 243; United States v. Partelle, 48 F. 670.) To allocate jurisdiction over such crimes to the Federal courts, there must be shown some treaty or act specifically so commanding. (United States v. Partelle, supra; see Draper v. United States, 164 U. S. 420.) The reason is simply this: the original thirteen states and those later admitted into the Union on an equal basis with the original thirteen, have general criminal jurisdiction over all non-Indian persons within the State limits, including Indian reservations. (United States v. McBratney, supra.) Even as to Indians, the national government's exclusive jurisdiction of the crimes over which it has by statute assumed jurisdiction, applies only to Indians living "in the tribal relations" (Peters' case, 2 Johns. Cases 344; People ex rel. Cusick v. Daly, supra, 212 N. Y. at p. 193.) It is a jurisdiction stemming from the power to legislate in "Indian affairs" and not embracing all occurrences on Indian lands. The case of the New York Indians (5 Wall. 761), is not to the contrary; it forbade State taxation of tribal lands on this reservation because such taxation would be "offensive to the tribal relations" (p. 771). Cases like Pickett v. United States (216 U. S. 456), merely show that in the later-admitted states the Federal government may, and sometimes did, in granting statehood, or in creating Indian reservations out of lands owned by the United States, expressly reserve exclusive jurisdiction on such Indian lands, as to all justiciable matters. No such situation has ever existed in New York State. In 1834, Supreme Court Justice McLean held at Circuit (United States v. Bailey, 1 McLean, 234) that a United States Court could not try a white man for killing another white man on a Cherokee reservation. "The State of New York" he noted (p. 239) "for many years has punished its citizens for crimes committed in the Indian territory within its limits".

Assuming that Congress could by statute take or keep for itself exclusive legislative control over the crime of murder, by whomever perpetrated, in the Allegany reservation, where is there any such statute? Relator relies on United States Code, Title 18, Sections 451 and 452 and United

States Code, Title 25, Section 217. The first two of those Sections (U. S. Code, Title 18, Sections 451, 452), so far as important here, define, and provide for the punishment of murders "committed within or on any lands • • • under the exclusive jurisdiction (of the United States)." We find no ground whatever for a holding that the Allegany reservation was ever "under the exclusive jurisdiction" of our Federal government. Ultimately, relator's opposing argument stands or falls on his own construction of the Treaty of 1794, a construction which we have rejected in preceding paragraphs of this opinion and which has never in practice been accepted by any branch of either the New York State or the United States Government. In the other statute (U. S. Code, Title 25, Section 217) urged upon us by relator as empowering the United States Courts alone to deal with murders done on reservations, the language is that, with exceptions not here relevant, "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States • • • shall extend to the Indian country." Relator says that the Allegany reservation, including the City of Salamanca, is "Indian country." Without passing squarely on the point, we conclude that there is some basis for it. "Indian Country," archaic as the phrase now sounds, still seems to comprehend any unceded land, such as a reservation, occupied by an Indian tribe—any place to which the Indian title has not been extinguished. (Donnelly v. United States, supra; Bates v. Clark, 95 U. S. 204; ex parte Crow Dog, 109 U. S. 556; Pronovost v. United States, 232 U. S. 487; United States v. Pelican, 232 U. S. 442; United States v. Chavez, 290 U. S. 357.) We may doubt whether the phrase "Indian country" ever did have any meaning in connection with the Six Nations and more doubt as to whether it could, in any event, be reasonably applied to Salamanca, in which live only a handful of Indians and which is, by State statute and Act of Congress (as we shall see hereafter) a white man's city. Only by main force, we think, could the term be applied to a city all of the lands of which have, by corporate action of the Seneca Nation and with the express consent of Congress (see later discussion of

the Act of 1875) been leased to white persons. "A country without Indians could hardly be considered an Indian country" (United States v. Richard, 1 Ariz. 31, 39, 40). But, whether or not Salamanca is still "Indian country" in some sense or other, we state with confidence that the particular statutes cited by relator have never been considered as giving the Federal courts absolutely exclusive jurisdiction of crimes, whether committed by Indians or Whites, on the New York State reservations. In Benson v. United States (44 F. 178), the Circuit Court, reversing a conviction, held that Benson, operating a tavern in Salamanca, was not guilty of introducing intoxicating liquors into the "Indian country" (see U. S. Code, Title 25, Section 241).

In Mullins v. Snow (232 N. Y. 47, 50, 51), this court recognized, but did not define the limits of, the power of the State to legislate even in some respects "for the tribal Indians living on reservations" and referred to power of Congress as being one "to legislate for them (the Indians) within their reservation." The Supreme Court, in State v. Dibble (62 U. S. 149), referring to a New York State statute relating to intrusions of white men on Indian lands, and speaking specifically of the Tonawanda reservation of the Senecas, said: "Notwithstanding the peculiar relation which these Indians hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as was necessary to preserve the peace of the commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered." It would take too long to list the various assumptions by New York State of various kinds of control over the Indians themselves, and the ratifications and recognitions thereof by the Federal government and courts. (See United States ex rel. Kennedy v. Tyler, supra.) Justice Andrews, later of this court, wrote in a memorable opinion (George v. Pierce, 85 Misc. 105, 122): "Our Courts have assumed criminal jurisdiction over them (the Six Nations). Our legislature has asserted their right so to do. And this jurisdiction has been mentioned by the Supreme Court of

the United States without disapproval." Justice Andrews, recalling that the Indians of the Six Nations were in fact wards of this State at the time it became an independent sovereignty on the adoption of the Declaration of Independence and that among other sovereign rights of the State, as successor to the British Crown before the adoption of the Constitution, was its protectorate over the Indian tribes, pointed out that New York never transferred to the general government any rights over the Indians except as expressed in the Federal Constitution, and that, in a broad sense, the Indians of the Six Nations are, unlike the western Indians "wards of the State—not of the United States" (85 Misc. at p. 120). From all of this, it is plain enough, we think, that the doubts and vagueness that becloud the general subject of law on Indian reservations, have nothing whatever to do with criminal prosecutions like that of this relator for the killing of Paul Balsiger, in Salamanca, New York, in 1939.

In an earlier paragraph of this opinion we stated, as one of the bases for our conclusion herein, that there is a Federal statute which makes applicable to the city of Salamanca the general laws of the State of New York. That enactment (U. S. Code, Title 18, Stat. 330 Ch. 90) was passed by Congress in 1875. It provides as to Salamanca (then a village) and several other named villages in the Allegany reservation that "all municipal laws and regulations of said State (New York) may extend over and be in force within said villages." From the historical background of the statute, the setting of the quoted language therein, and from subsequent authoritative interpretation given it by the New York Legislature, it is plain to us that "all municipal laws and regulations of said State" means all the internal, domestic laws of the State. Our arrival at that conclusion has not been a hasty or incautious one, conscious as we are that the United States Circuit Court of Appeals has, in *United States* v. *Forness* (125 F. 2d 928, cert. den. 316 U. S. 694) interpreted somewhat differently the phrase of the statute: "municipal laws." As always, we give due and great respect to the construction by a Federal court of a Federal statute, but we are not strictly bound in such matters by any but United States Supreme Court decisions.

In this instance we feel constrained to make our own independent decision. We are called upon in this case to decide whether or not there exists any legal basis for the undisputed enforcement in Salamanca, for the past sixty-five years or more, of the general penal laws of this State. The Circuit Court of Appeals did not have any such broad question before it in the Forness case. The Forness case was brought on behalf of the Seneca Nation, in ejectment, to oust one of the white lessees for nonpayment of the rent due from him to the Nation. One of the issues before the Circuit Court was as to the applicability to such a lawsuit between the tribe and a white individual, of sections 997-999 of the New York Civil Practice Act, particularly section 999, which permits payment into court, at any time before judgment, of the rent due, with costs; and requires a dismissal of the action, on such payments being made. Whatever the words "municipal law" may mean in the case we have before us on this appeal, or in other connections, it is entirely clear that Congress, validating the Indian leases and reserving a measure of Federal control over the leased lands, could not have intended by the 1875 statute to make applicable to controversies over those leases the New York laws as to remedies of the lessor on a default by the lessee. As the Special Term said in the present case, interpreting section 5 of the 1875 statute: "Potential conflicts between Indian lessors and the lessees involving forfeiture of leases and the like, are since the Indians have a degree of sovereignty and are the wards of the Federal government, extra-mural matters, so far as the laws of the United States are concerned. Such matters are subject to the laws of the United States."

We agree with the Circuit Court of Appeals that "municipal laws" has two meanings. Broadly and classically it means the laws pertaining to the internal government of a State or nation. (See 1 Blackstone Comm. 44; People v. Tiphaine, 3 Parker Cr. Rep. 244.) In its more modern and narrower connotation it means those laws which pertain to towns, cities and villages and their local governments. Intrinsically the words may have either of those meanings. But historical research, we believe, establishes that the broader and older intendment must have been the one used

by Congress. The statute was passed because of a pressing difficulty. Long before 1875, Salamanca and several other villages of white men had sprung up on the Allegany reservation, and the white settlers and several railroad companies who built their lines through the reservation lands, had made their improvements on the faith of land leases from the Indians. Although confirmed by act of the New York Legislature of this State passed and transmitted to Congress a resolution (L. 1875, p. 819) requesting the latter body to pass some law "for the relief of said white settlers." Soon thereafter, Congress on February 19, 1875, enacted the law we are here construing. After providing for appropriate validation of the leases, the statute in its last paragraph, says this: "That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages (including Salamanca), and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: Provided, nevertheless, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States." The best possible clue to the meaning of "all municipal laws and regulations of the State" as used in the Act is found in the action taken by our State Legislature, after Congress had acceded to its request by passing the statute above described. Apparently the new leases authorized by the Federal Act were entered into in 1880. In 1881, our Legislature, undoubtedly as a sequel to that passage of the Federal Act, put on our statute books chapter 881 of the Laws of that year, now section 71 of our State Indian Law, wherein, changing the word "municipal" to "general" it directed that "all the general laws of the state are extended over and apply to the same (the villages of Salamanca et al.)." From that day until the Forness case (supra) was decided, no one has ever expressed a doubt, as far as any record shows, that the word "municipal" as used by Congress and the word "general," as used by our Legislature, meant exactly the same thing, and that both

words included and envisaged the whole State system of laws for the internal government of the residents of the village, and not merely minor local ordinances, or State laws dealing with the details of village government. Such a use of the phrase "municipal law" was technically and scientifically correct for the result intended. The Act of 1875 was an act of cession in the sense that it ceded to the State such governmental jurisdiction as the national government or the Seneca Nation might otherwise have or been thought to have, over the white villages. (Incidentally such cessions or relinquishments of Federal control over the government of Indian lands are not unusual and are considered legal even in contravention of treaties. (See Lone Wolf v. Hitchcock, 187 U. S. 553, 566, 567; Tiger v. Western, 221 U. S. 286, 315; Shoshone v. United States, 299 U. S. 476, 497).

To describe the body of law which was to be operative in such ceded territory, the phrase "municipal laws" was appropriate and conventional. In Chicago v. Pacific Railroad Co. (1885) (114 U. S. 542), the Supreme Court was called upon to decide whether a State statute remained in effect on the Fort Leavenworth Military Reservation after the State of Kansas had ceded to the United States exclusive jurisdiction therein. A quotation from that opinion (p. 546) will show better than extended argument how apt and necessary was the phrase "municipal laws" to convey the idea that in the Village of Salamanca, private property and private conduct were to be regulated by the laws of the State of New York: "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign." (For similar uses of the word "municipal" see Halleck, Int. Law (1st ed., 1861), ch. 33, Sec. 14; Vilas v. Manila, 220 U. S. 345, 347; Murray v. Gerrick, 291 U. S. 315, 319.) Thus we see that the clause "all municipal laws and regulations of said State may extend over and be in force within said villages" was a short but scientifically complete way of eliminating any doubt as to whether, after the Act's

passage, the laws affecting private rights of the residents of the villages would be those of the United States, or the Seneca Indians, or the State of New York. The Circuit Court of Appeals thought that giving "municipal laws" its more ancient meaning, i.e., of general State laws as opposed to international laws, would result in an absurdity since, said that court, the State of New York had no international relations or international law. But the villages and their villagers did have and continued to have a relationship, based on their leases, with the still quasi-independent Seneca Nation.

Relator argues that the specific reference in the above quoted 1875 Congressional statute to state laws concerning highways and bridges shows that the later-used term "municipal laws" had no application to State laws. On the contrary, we think that the statute itself shows why the highway and bridge laws were separately mentioned, i.e., because the Seneca nation in council was to have the right to extend those laws to the whole reservation.

The order should be affirmed.

Lehman, Ch. J., Loughran, Lewis, Conway, Thacher and Dye, JJ., concur.

(9027)

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 8 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* DONALD A. J. RAY,

Petitioner-Appellant,

vs.

WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York,

Appellee.

BRIEF ON BEHALF OF PETITIONER IN CERTIORARI GRANTED OCTOBER 8, 1945, ON PETITION FOR CERTIORARI FILED JUNE 23, 1945, TO REVIEW JUDGMENT OF COUNTY COURT OF WYOMING COUNTY, NEW YORK STATE, AND THE DECISION OF THE COURT OF APPEALS OF THAT STATE UPON WHICH SAID JUDGMENT WAS ENTERED.

THOMAS J. McKENNA,
Attorney for Petitioner-Appellant,
Office & P. O. Address,
706 Morgan Building,
Buffalo, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statement of Case	3
Specification of the Assigned Errors to be Urged	3
Summary of Argument	5
Argument	6
Point I: Section 71 of the New York State Indian Law which undertook to extend into the *locus in quo* within an Indian Reservation the General Laws of the State, which included among others Section 1044, Subdivision 2 of the Penal Law, the "felony murder" for which appellant was tried and Section 1045-A of the same law under which he was sentenced to life imprisonment, is repugnant to Article I, Section 8, Clause 3 of the United States Constitution and Treaties and Federal Laws made under that constitutional provision, and the New York State Court erred in holding that section of the Indian Law was a valid basis for State jurisdiction of the offense	6
(1) Historical Facts and Treaties which Withdrew the *locus in quo* from the Operation of State Laws	7
Analysis of Applicable 1794 Treaty	10
(2) Applicable Federal Enactments Showing Exclusive Jurisdiction	16
(3) Applicable Judicial Interpretations Decisive of the Issue	22
(a) Two New York State Appellate Court decisions which sustain appellant's claim	22
(b) A U. S. Supreme Court case directly in point	23

PAGE

(e) A U. S. Supreme Court case, involving the reservation in question, which held the Legislature of the State of New York could not extend its laws into these lands 24

(d) A United States Supreme Court denial of certiorari from a United States Circuit Court of Appeals decision holding that the 1875 Congressional Act extended only Highway and Bridge Laws into the *locus in quo* and that any other statutory or decisional law of the State of New York did not apply to this reservation 25

(e) An early U. S. Supreme Court decision holding the Federal Government recognizes the National character of Indian tribes and their protection by treaty and laws of Congress to such an extent as to withdraw their property from the operation of State Laws 28

(f) A case involving murder of non-Indian by non-Indian on reservation 28

Point II: Treaties made under the Federal constitutional provision and Federal statutes enacted thereunder to cover offense in question within the *locus in quo* rendered invalid Section 1044, Subdivision 2 of the State Penal Law and Section 1045-A of the same State Law, and the New York State Court erred in holding said State Penal statutes valid and applicable to the place in question without the aid of the heretofore challenged Section 71 of the State Indian Law 29

Point III: Appellant's commitment and incarceration by virtue of an order of the Supreme Court of the State of New York in violation of what has been set forth under Points I and II of this brief are a violation of appellant's rights guaranteed by Amendment XIV, Section 1 of the Constitution of the United States and appellant is entitled to the remedy of habeas corpus 29

PAGE

Conclusion 30

Prayer for Reversal 30

Appendix A—Treaties and Statutes Involved 31

Appendix B—Necessary Portion of Treaty Making Treaty of 1794 Applicable. (7 Stat. at Large 586) 35

Appendix C—Section Dispensing with Treaties but Reserving Existing Rights of Pre-existing Treaties 37

Appendix D—Subdivision of Federal Statute Providing for Territorial Jurisdiction of Offense and Statute Setting Forth Facts which Make Offense of Murder, First Degree 37

Appendix E—Statute which Extends Crime in Question to City of Salamanca 38

Appendix F—House Record, Disclosing Acknowledgment that only Congress can Legislate for this Reservation and Recognition of Judicial Decision that State Law cannot be Extended into Reservation 38

Appendix G—Applicable Portion of Act of Feb. 19, 1875 Based on State's Request which Apparently was Relied on as a Source of New York State Court Jurisdiction. (Ch. 90, 18 Stat. L. 330) 39

Appendix H—Applicable Portion of Section of New York Statute which Purports to Extend General Laws of State over City of Salamanca 40

Appendix I—Act of Congress in 1929 Showing Congressional Intent that State can only Extend its Laws into Reservation by Consent of Congress 41

Appendix J—Applicable Portion of a Recent Bill in House of Representatives which Shows Recognition by that Body that Place in Question Is not Subject to Criminal Laws of State 41

Appendix K—Applicable Portion of a Recent Bill in Senate which shows Recognition by that Body that Place in Question Is not Subject to Criminal Laws of State 42

Appendix L—Section of State Law Defining Crime and Section Governing Punishment 43

Index to Cases.

	PAGE
Bishop vs. Barton, 2 Hun, Sup. Ct. Rep. of N. Y. 436 (1874)	22
Donnelly vs. U. S., 228 U. S. 242 (1913)	29
Ex Parte Crow Dog, 109 U. S. 556 (1883)	20
Kansas Indians, 5 Wall. U. S. 737 (1866)	28
New York Indians, 5 Wall 761 (1886)	10, 16
Patterson vs. Seneca Nation, 245 N. Y. 433, 157 N. E. 734 (1927)	22
Pickett vs. U. S., 216 U. S. 456 (1910)	28
Pronovost vs. U. S., 232 U. S. 487 (1914)	20
Ryan vs. Knorr, 19 Hun. 540 (1880)	16
U. S. vs. Chavez, 290 U. S. 357 (1933)	19, 20
U. S. vs. Forness, D. C. N. Y. (1941) 37 F. Supp. 337, reversed C. C. A. (1942, 2nd Circuit) 125 Fed. 2d. 928, Certiorari denied, City of Salamanca vs. U. S., 1942, 62 S. Ct. 1293, 316 U. S. 694	25, 27
U. S. vs. Kagama, 118 U. S. 375-382 (1886)	17, 18
U. S. vs. Pelican, 232 U. S. 442 (1914)	20
U. S. vs. Soldana, 246 U. S. 530 (1918)	20
Whitney vs. Robertson, 124 U. S. 190 (1881)	17
Worcester vs. Georgia, 6 Pet. 515 (1832)	23, 30

Textbook Authority.

F. S. Cohen Handbook on Federal Indian Law (1941). 14

Treaties.

Treaty of 1794 between Six Nations of Indians and United States (7 Stat. at Large 44) 4, 10, 17

Treaty of 1842 between Seneca Nation of Indians and United States (7 Stat. at Large 586) 9

Federal Statutes.

PAGE

Act of March 3, 1871 (R. S. 2079), Sec. 71 of Title 25 U. S. C. 16, 17
House Misc. Doc. No. 75, 1875 17
Act of Feb. 19, 1875, c. 90, 18 Stat. 330, amended by Act of Sept. 30, 1890, c. 90, 18 Stat. 558 ..... 4, 17
Sub-division 3 of Sec. 451 of Title 18 U. S. C. (R. S. Sec. 5339) 4, 18, 37
Sec. 452 of Title 18 U. S. C. 4, 18, 38
Sec. 217 of Title 25 U. S. C. 4, 18, 19, 38
Sec. 231 of Title 25 U. S. C. 21, 41

New York State Statutes.

Sec. 71 of New York State Indian Law, Ch. 188 of New York Laws of 1881 ..... 4, 5, 17, 21, 27, 40
Sec. 1044 Penal Law of the State of New York, Sub-division 2 ..... 3, 4, 43
Sec. 1045-a of the Penal Law of the State of New York. 3, 4

Pending Congressional Bills.

House of Representatives, 3710 41
Senate, 1179 42

Federal Constitutional Provisions.

Article I, Section 8, Clause 3 24
Amendment 14, Section 1 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* DONALD A. J. RAY,

Petitioner-Appellant.

vs.

WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York,

Appellee.

BRIEF ON BEHALF OF PETITIONER IN CERTIORARI GRANTED OCTOBER 8, 1945, ON PETITION FOR CERTIORARI FILED JUNE 23, 1945, TO REVIEW JUDGMENT OF COUNTY COURT OF WYOMING COUNTY, NEW YORK STATE, AND THE DECISION OF THE COURT OF APPEALS OF THAT STATE UPON WHICH SAID JUDGMENT WAS ENTERED.

Opinions Below.

The opinion of the District Court (R. 7-12) is reported at 54 Fed. Supp. 218.

The opinion of the Circuit Court (R. 12-13) is reported at 141 Fed. 2d. 300.

The opinion of Wyoming County Court (R. 20-33) is reported at 181 Misc. 925.

The opinion of the Appellate Division, Fourth Department (R. 36-39) is reported at 268 A. D. 218.

The opinion of Court of Appeals (R. 43-55) is reported at 294 N. Y. 61.

Jurisdiction.

This Court has jurisdiction of this offense by virtue of the following order of this Court:

Appeal from the County Court of Wyoming County, State of New York.

Order dismissing appeal and granting certiorari, October 8, 1945.

The appeal in this case is dismissed for want of jurisdiction, sec. 237(a) of the Judicial Code as amended, 28 U. S. C., sec. 344(a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by sec. 237(c) of the Judicial Code as amended, 28 U. S. C., sec. 344(c), certiorari is granted. The Solicitor General of the United States is invited to file a brief *amicus curiae* if he is so advised.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this case. (R. 63, 64.)

The papers whereon appeal was allowed as a petition for a Writ of Certiorari were filed with this Court June 23,

1945 (cover of record) and order allowing appeal was dated May 16, 1945. (R. 60, 61.)

Statement of the Case.

The material facts are not in dispute. Appellant is serving in a New York State prison a life sentence imposed on him by the Supreme Court of that State on December 15, 1939, for the commission, at the City of Salamanca, of a "felony murder" (Penal Law, Sec. 1044, Subd. 2, Sec. 1045-a). Almost the whole of that City, including the scene of the crime, is within the bounds of Allegany Reservation of the Seneca Nation of Indians. (R. 5 to 9 and 18.)

Appellant is not an Indian, nor was the victim of the crime. (R. 4 and 5.) In this habeas corpus proceeding, appellant asserts that the State Court was without any jurisdiction of his offense, committed as it was, on an Indian Reservation. (R. 5.) No such challenge to the jurisdiction was made during the trial or on the appeal therefrom to the Appellate Courts of the State. (R. 6.) The City of Salamanca now has a population of about nine thousand. (R. 19 and 20.)

Specification of the Assigned Errors to be Urged.

The opinion of the Court of Appeals (R. 41 to 59) was so extensive as to necessitate the urging of all the assigned errors. (R. 59, 60.)

The Court of Appeals, the Court of final jurisdiction in the State of New York, egred:

1. In holding that petitioner could be tried and convicted and sentenced for a violation of Section 1044, Subdi-

vision 2 and 1045-a of the Penal Law of the State of New York for the crime in question, committed, as it was, by a non-Indian as against a non-Indian in the City of Salamanca, New York. The present City of Salamanca, being part of the Allegany Reservation, which, with several other such areas, was set aside by the United States, pursuant to Treaties, for the Seneca Nation of Indians.

2. In holding that the New York State Court had jurisdiction of the offense in question (felony murder) despite the terms of a treaty entered into with the Iroquois Six Nations of Indians in 1794 (7 Stat. at Large 44.)

3. In holding that the treaty did not exclude New York State jurisdiction over the offense committed in the City of Salamanca.

4. In holding that Section 8 of the Federal Act of 1875 (Ch. 90, 18 Stat. L. 330) conferred jurisdiction of the offense in question. (fol. 92.)

5. In holding that that Act (The Federal Act of 1875) was a proper legal basis for the enactment of Section 71 of the Indian Law of the State of New York.

6. In holding that the State Court had jurisdiction of this offense by virtue of the validity of Section 71 of the Indian Law of the State of New York.

7. In holding that Section 217 of Title 25, U. S. C. annotated, did not confer jurisdiction upon the Federal Courts for the offense in question.

8. In holding that subdivision 3 of Section 451 of Title 18, U. S. C., and Section 452 of Title 18, U. S. C. did not confer the jurisdiction of the offense in question.

9. In holding that the last three mentioned sections, when read together, did not apply to the offense in question when committed on the lands in question.

Summary of Argument.

This brief will argue:

That the scene of the crime (felony murder) is within the Allegany Indian Reservation which lies wholly within New York State.

That New York's early attempt to exercise jurisdiction over this reservation and other ancient lands of the Iroquois Indians within that State invited a prolonged frontier war which the new Union was not prepared to prosecute.

That the situation thus created necessitated treaties between the Federal Government and the occupants of such lands.

That such treaties recognized the National character of the Indians and withdrew the Allegany and Cattaraugus Indian Reservations from the operation of State Laws.

That applicable Federal Statutes, enacted subsequently, were such as to show that only Congress could legislate for those lands.

That an 1875 Congressional Act extended only the State highway and bridge laws into the *locus in quo*.

That that act did not make Federal provision for enactment of a New York State Statute (Section 71 of New York

State Indian Law) which undertook to extend the laws of that state into the place in question.

That applicable Federal and State Judicial decisions establish that, aside from the extension of State highway and bridge laws as provided for in the 1875 Congressional Act, the laws of the State of New York—statutory or decisional—do not apply to the reservation in question.

That by virtue of such treaties, federal statutes and judicial decisions, the federal courts had exclusive jurisdiction of the offense.

That in view of the foregoing, appellant's incarceration by virtue of a state court commitment, is a violation of the "due process" clause of the Fourteenth Amendment of the Federal Constitution.

ARGUMENT.

POINT I.

Section 71 of the New York State Indian Law which undertook to extend into the *locus in quo* within an Indian Reservation the General Laws of the State, which included among others Section 1044, Subdivision 2 of the Penal Law, the "felony murder" for which appellant was tried and Section 1045-A of the same law under which he was sentenced to life imprisonment, is repugnant to Article I, Section 8, Clause 3 of the United States Constitution and Treaties and Federal Laws made under that constitutional provision, and the New York State Court erred in holding that section of the Indian Law was a valid basis for State jurisdiction of the offense.

Jurisdiction of this offense committed as it was, on an Indian Reservation, was solely federal. Such jurisdiction is established by:

(1) Historical facts and treaties which withdrew the *locus in quo* from the operation of state laws;

(2) Applicable federal enactments showing exclusive jurisdiction;

(3) Applicable judicial interpretations decisive of the issue.

(1) Historical Facts and Treaties which Withdrew the locus in quo from the Operation of State Laws.

The *locus in quo* (the present City of Salamanca) is part of the Allegany Reservation, which, with several others, was set aside by the United States for the Seneca Nation by virtue of four different treaties[1] with the Iroquois[2] and a subsequent treaty[3] with the Senecas.

After General Sullivan's punitive expedition against the Indians in 1779, New York attempted to exercise jurisdiction over the Iroquois and their lands within that State. This jurisdictional assertion by New York consisted of an effort to rid the State of the Senecas and three other nations of the Iroquois and to move the two remaining nations of

[1] Treaty October 27, 1784 with the Six Nations, 7 Stat. at Large 15; Treaty of January 9, 1789, *id.* 33; Treaty of October 11, 1794 *id.* 44, (appendix A to brief, pages 32-35); Treaty of January 15, 1838 *id.* 550, with supplemental articles on February 13, 1838 *id.* 561;

[2] Five united nations of Indians which originally occupied what is now northern and western New York State subsequently banded together with a sixth tribe of Indians from North Carolina and became known as the "Iroquois" or "Six Nations." Through subsequent conquest, expulsion, alignment and absorption of other tribes more than 35 western tribes were brought under their influence and leadership. The Iroquois insisted on acting in their collective capacity and England and several of the colonies, acting together, observed this demand by entering into treaties with them prior to the Revolution. (The historical facts for this statement, and all statements involving the historical facts relied on in this brief in connection with the treaties are taken from Cohen's Hand Book of Federal Indian Law pages 416 to 422.)

[3] Treaty of May 22, 1842 with the Seneca Nation of Indians, 7 Stat. at Large 586.

the Six Nations to a small part of the lands of the Senecas in the western part of the State. Because this procedure, employed by New York to further her jurisdictional claim, was proving antagonistic to the Iroquois and because of the possibility that the Six Nations were in a position to enlist the aid of more than thirty-five western tribes of Indians, under their influence and leadership, in a united general offensive, which the new Union was not, at that time, prepared to meet, Washington, in 1783, made a personal trip to New York.

Appreciative of the importance of these Indians in relation to all of the states and aware of the fact that any delayed condonation of New York's move would precipitate a long, cruel and expensive frontier war, the Central Government, in 1784, made a treaty of peace with the Iroquois.[5] While the 1784 Treaty negotiations were being carried on, New York, in a further attempt to assert jurisdiction and challenge the jurisdiction of the Central Government, arrested the treaty agents of the confederated government.[6]

[5] This treaty set forth in 7 Stat. 33, in substance provided:

"(a) A treaty of peace and general amnesty between the Iroquois and the United States with provisions for prisoners of war and relinquishment of their claim to roughly all lands west and south of what is now New York; (b) a treaty with Pennsylvania relinquishing all lands in that state; and (c) a treaty between New York and the Oneidas and Tuscaroras, relinquishing certain of their lands."

[6] Richard Henry Lee, later President of the Continental Congress, in writing to George Washington concerning the efforts of New York to obstruct the treaty, said:

"* * * I understand, from Mr. Wolcott, that the commissioners of the United States met many difficulties, thrown in their way by New York, which they overcame, at last, by much firmness and perseverance. It is unfortunate when private views obstruct public measures, and more especially when a state becomes opposed to the States; because, it seems to confirm the predictions of those who wish us not well, and who cherish hopes from a discord arising from different interests." (Ballagh, James Curtis, The Letters of Richard Henry Lee (1911) vol. 2, p. 298.)

After the adoption of the Constitution in 1787, Great Britain still retained forts in New York and the Northwest Territory in violation of the treaty of peace and was arming the western Indians and the Iroquois and inciting them to hostilities against the United States. To cope with this emergency which tended to endanger its survival, the United States in 1789 again entered into a treaty with the Iroquois recognizing the Indians as distinct and separate political communities capable of managing their internal affairs as they had always done.[7] Following this, the settlement of the Northwest by Whites resulted in friction between the Indians and the settlers which broke out into frontier wars. A continuation of conditions responsible for the making of the 1789 treaty and the western frontier wars created a decided unrest particularly among the Senecas.

To overcome this threat, the United States, again in 1794, entered into a third treaty (App. A to b., pp. 32-35) with the Iroquois[8]. This treaty, subject to subsequent federal enactments, (discussed further on in this brief) is the treaty which now applies to, controls, and determines the jurisdictional rights of the Allegany and Cattaraugus Reservations. This is so despite a subsequent treaty in 1838 between the United States and the Six Nations[9] and a still subsequent 1842 treaty[10] (App. B to b., pp. 35-36) between the United States and the Seneca Nation of Indians. The 1842 Treaty abrogated the provisions of the 1838 Treaty which would have extinguished the Indian title

[7] This Treaty set forth in 7 Stat. at Large 33 granted to the Iroquois a substantial annuity and they in turn agreed to continue at peace.

[8] This treaty of November 11, 1794 is set forth in 7 Stat. at Large 44 and App. A to brief pp. 32-35;

[9] Treaty of January 15, 1838, 7 Stat. at Large 550 with supplemental articles on February 13, 1838 *id.* 561;

[10] Treaty of May 22, 1842 with the Seneca Nation of Indians, 7 Stat. at Large 586 and App. B to brief pp. 35-36.

to those two reservations and expressly reserved all the rights enjoyed by those two reservations under the 1794 Treaty.

Reversion of the rights of this reservation to the 1794 Treaty is set forth and explained in the following review of the facts in the case of New York Indians, 5 Wall., (U. S.) 761 where, at page 767, the court said:

> "By the treaty of 1838 the Seneca nation on these reservations agreed to remove to the west of the Mississippi River, and, at the same time, with the consent of the United States, sold their lands to Ogden & Fellows, who held the pre-emptive right, derived from Massachusetts, and executed a conveyance of the same. The treaty provided for the removal within five years. It was proclaimed April 4, 1840. Before the expiration of the five years, difficulties arose between the grantees and the Indians, which resulted in a new treaty, 20th May, 1842, between the United States and the Seneca nation, when it was agreed that the deed embracing these two reservations should be cancelled, and the Indians remain as before with all their original rights. The words are: 'The said nation shall continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus reservation and the Allegany reservation, with the same right and title in all things as they had and possessed therein immediately before the sale of said reservation.'"

Analysis of Applicable 1794 Treaty.

In connection with a proper analysis of this 1794 Treaty, it must be realized that the provisions of the Articles of that Treaty would, of necessity, have to be considered as worthless and unnecessary if there existed in the minds of the parties to the Treaty any understanding that New York State had, or was to have, jurisdiction over the designated lands and their occupants.

The following portion of the preamble of the Treaty clearly discloses that existing causes of complaint were to be removed from the minds of the Indians:

> "The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; * * *." App. A to b. pp. 32-35.)

With the above quoted portion of the Treaty in mind, the provisions of the articles of the treaty must be looked to in order to determine what such causes of complaint were.

ARTICLE I of this Treaty provided for the establishment of perpetual peace and friendship between the parties.

ARTICLE II dealt with the boundaries of other nations of Indians.

ARTICLE III defined the boundaries of the lands of the Seneca nation in the State of New York and acknowledged all of that land to be the property of the Seneca nation. Included within those lands is the present City of Salamanca. It further provided that the U. S. would never claim the land nor disturb the Seneca nation, nor any of the six nations or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof and it was to remain theirs until they chose to sell the same to the People of the U .S.

This article evidenced three separate complaints and one over-all complaint. The first was one regarding territorial limits of the lands. The second involved the free use and enjoyment of such lands, and the third dealt with a complaint regarding any possible attempt to seize the de-

fined lands at some later date. In its entirety it clearly evidenced a complaint to avert any renewed attempt by New York to exercise jurisdiction over the lands and occupants thereof. The precaution taken by this article would not have been necessary if the Federal Government entertained any notion that New York had, or was to have, jurisdiction.

ARTICLE IV of that Treaty provided that the Six Nations would not claim any other lands within the boundaries of the U. S. nor disturb the people of the U. S. in the free use and enjoyment thereof.

ARTICLE V ceded to the U. S. the right of making a wagon road from Fort Schlosser on the upper Niagara to Lake Erie, as far south as Buffalo Creek, and ceded to the People of the U. S. the free and undisturbed use of this road for the purpose of travel and transportation.

Examination of this article evidenced cause to complain regarding trespass on these lands. It discloses that the only right conceded to the People of the United States, including the Legislature of the State of New York, was a right to travel or transport over the defined lands. Why the precaution provided in this article against trespassing and also the restriction as to roads through such lands, if New York State had jurisdiction?

ARTICLE VI provided for an annuity to the Indians for purchasing clothing, domestic animals, implements of husbandry and other utensils suited to their circumstances. It was also to provide for compensating useful artificers who were to reside with or near them and be employed for their benefit.

This article evidenced cause to complain as to what parties were entitled to live on these lands. It limited such right to legislative members and others employed as artificers for the benefit of the Indians. Its exceptions did not include State Police or other State law enforcement agencies.

ARTICLE VII provided for the procedure and method of ascertaining punishment to govern cases of misconduct of individuals, on either side, tending to interrupt the peace and friendship of either party. Under the procedure agreed upon the Indians were to complain of non-Indian offenders to the President, or to a superintendent appointed by him. The president or his appointee was to enter complaints of misconduct of offending Indians to the principal Chiefs of the Six Nations or the nation of which each offender was a member.

Following the complaint, such prudent measures as necessary to preserve the peace were to be pursued. This method of procedure and manner of ascertaining and determining punishment were to continue until such time as Congress made other equitable provisions for the purpose.

By express terms, this provision evidenced cause to complain, regarding the jurisdiction over misconduct of Indians and non-Indians within those lands. By express terms, jurisdiction of the misconduct of individuals which would, of necessity, include non-Indian offenders, was exclusively vested in the Federal Government by this article. This article also expressly provided that all future legislation for this reservation should be vested in Congress. Why the precaution in this Article to expressly exclude State jurisdiction over misconduct of individuals and vest it in

Federal Government if State had or was to have any degree or measure of control? Why was provision also made for future Federal Legislation?

A proper analysis of the applicable historical facts which led to the making of the treaties and the provision of the treaties clearly lead to the following conclusions set forth at page 419 of Cohen's Hand Book of Federal Indian Law:

> "The several treaties guaranteed to the Iroquois (Six Nations) the right of occupancy of their well-defined territories and had the effect of placing the tribes and their reservations beyond the operation and effect of general state laws."

In 1786, two years after the 1784 treaty, Massachusetts claimed its Royal Charter gave it sovereignty and jurisdiction over much of the lands of the Iroquois in Western New York. As a result, New York entered into a compact with Massachusetts, by the terms of which New York was recognized as having sovereignty and jurisdiction over the lands and Massachusetts was recognized as the owner of the "right of pre-emption" of the lands themselves, including the right to extinguish such title as the Indians had. This compact subsequently ratified by the Congress of the United States, authorized Massachusetts to grant and convey the right of pre-emption to individuals who were to have the right to extinguish, by purchase, the claims of the native Indians.

In 1791, Massachusetts conveyed its title, subject to the Indian claims, to Robert Morris, who later conveyed it to the Holland Land Company, Morris agreeing to extinguish the Indian rights at his own expense. He did so in 1797 when at a great council of the Senecas held at Geneva, New York, he received from the Seneca Nation a conveyance of

all the lands purchased by him from the State of Massachusetts, excepting certain Indian Reservations, including the Allegany Reservation[1] with which we are here concerned. The council was held and the conveyance made with the approval of the government of the United States, as represented by its Commissioner.

In connection with what has been pointed out regarding this right it will be noted that this claim of Massachusetts was disregarded and not considered by New York when she attempted to seize these lands from the Indians prior to the 1784 treaty. It would appear as though that resurrection of this claim and action thereon were an afterthought and seized upon as a means of circumventing the provisions of the various treaties heretofore outlined and discussed. It will also be noted, in connection with this situation, that the 1794 treaty in no way alluded to nor recognized any of the provisions of this compact.

Attention is further directed to the fact that the 1842 treaty, in no way alluded to this compact.

Despite any claim of illegality for such Congressional authorization it is clear that such Congressional authorization of this compact, insofar as attaching New York sovereignty and jurisdiction were concerned, was to apply only and if and when the Indian title to such lands had been extinguished. This case involves no quarrel with such a contention.

---

[1] The Allegany Reservation, claimed by the Senecas, contains 30,469 acres, and is located on both sides of the Allegany River in Cattaraugus County, N. Y. It is about 40 miles long and averages from 1 to 3 miles in width. It is part of the area specifically reserved to the Seneca Indians in the treaty with Robert Morris at "Big Tree" September 17, 1797. (Cohen's Hand Book of Federal Indian Law, page 422.)

(2) Applicable Federal Enactments Showing Exclusive Jurisdiction.

Chapter 316 of the New York State Session Laws of 1836 authorized Indian leases to railroads. New York State Courts, however, held that such leases were not valid. (Ryan vs. Knorr, 19 Hun. 540.)

On May 9th, 1840, the New York Legislature authorized a highway tax to be assessed upon the Allegany and Cattaraugus Reservations and on May 4th, 1841, the same Legislature authorized assessment of other taxes for making roads upon the same two reservations and the Buffalo Creek Reservation. The United States Supreme Court, in 1866, held such State legislation illegal in the case of The New York Indian, *supra*. In that case, at page 771, the Court said:

> "* * * the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations."

In 1847 New York State by Chapter 466 of its Session Laws permitted a lease of lands, in the present City of Salamanca which was then an Indian Village known as "Bucktooth." On various dates thereafter the state authorized further leases of these lands within what is now Salamanca. (See *i. e.* Chapters 30, 263 and 472 of 1866 Session Laws of New York.)

Prior to 1871, dealings between the United States Government and the Indian nations had been by treaty. By act of Congress, that year, this course was abandoned with no impairment of pre-existing rights under prior treaties. (Act of March 3, 1871, R. S. Sec. 2079 (App. C to b. p. 37.) Since that time their lands and affairs have been

regulated by Acts of Congress. (U. S. vs. Kagama, 118 U. S. 375-382.) But the treaty and the Act of Congress are of like force. (Whitney v. Robertson, 124 U. S. 190.) This act is now Sec. 71 of Title 25 U. S. C.

In 1874, a New York State Supreme Court decision, unreported,[1] invalidated leases in this reservation which had been purportedly ratified by the New York State Legislature. After that Supreme Court decision, invalidating leases in the reservation, the New York State Legislature requested Congressional action which would make valid such leases. (N. Y. Sess. L. 1875, 98th Sess. page 819.) The reason as therein expressed was to relieve white settlers, misled by the unwarranted and illegal state legislation. (House Misc. Doc. 75, 43d Cong. 2d Sess. 1875, App. F to b. pp. 38-39.)

In 1875, Congress now enabled to act by virtue of the heretofore alluded act of 1871, which dispensed with treaties, complied with the state legislature's request. This act (discussed later in this brief under judicial interpretations) ratified existing leases and permitted new five-year leases. (C. 90, 18 Stat. L. 330.) By a subsequent Act of Congress, in 1890, the number of years such leases were to run was extended to 99 years. (26 Stat. 558, Ch. 1132.) This entire act is set forth in the annotations under Section 71, McKinney's New York Indian Law. What appellant considers the applicable portion of that act is set forth in appendix G to brief, pages 39-40.

By force of the provisions of Article VII of the treaty in 1794, heretofore discussed in this brief, it was pointed

[1] The decision of Judge Barker referred to in that resolution seems to have been an unreported decision at Cattaraugus Special Term in May 1874 in the case of Nelson v. Downs, quoted in part in appellant's brief in Ryan v. Knorr, 19 Hun 540 (4th Dept., 1880).

out that provision was therein made for future Federal Legislation for the Six Nations. This reference to that Article is again made at this point in the brief because three federal statutes, subsequently enacted by Congress, could, in all likelihood, have been the source of such jurisdiction without the aid of the Federal Act of 1871 which dispensed with treaties and provided for future Federal legislation for Indians and their lands. The three statutes enacted were:

Subdivision 3 of Section 451, Title 18 U. S. C. (App. D to b. p. 37.)

Sec. 452 of Title 18 U. S. C. (App. D to b. p. 38.)

Sec. 217 of Title 25 U. S. C. (App. D to b. p. 38.)

Section 452 of Title 18 U. S. C. defines "murder" and the applicable portion of Subdivision 3 of Section 451 of Title 18 U. S. C. provides for Federal jurisdiction of such offense,

> "When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof. * * *"

Appellant contends that the place in question, by virtue of the terms of 1794 Treaty, is within that definition. This contention is further fortified by the statement of the United States Supreme Court in U. S. vs. Kagama, 118 U. S. 375 where that Court, at pages 383 and 384 said:

> "It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their

> deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, wherever the question has arisen."

This contention also finds support in the case of U. S. vs. Chavez, 290 U. S. 357, (1933). That case held that non-Indians charged with a larceny on an Indian Reservation were subject to federal jurisdiction because the reservation was a place under the exclusive jurisdiction of the United States and within the term "Indian Country" as used in Sec. 217 of Title 25 U. S. C.

Section 217 of Title 25 U. S. C. was included in the Federal revised statutes, of 1878, Sec. 2145. That section was in force at the time of the commission of the offense in question. It, in substance, provides that crimes (including murder) committed in any place within the sole and exclusive jurisdiction of the United States shall be extended to the "Indian Country".

In 1866, the United States Supreme Court in the case of New York Indians, *supra*, pointed out that the Allegany Reservation (the reservation in question) was "Indian Country" when at page 771, that Court said:

> "Any other party is an intruder, and may be proceeded against under the twelfth section of the Act of 30th June, 1834."

That Court could not have concluded that the quoted portion of the section of the 1834 act was applicable without having first determined that the place in question was "Indian Country" by force of the definition of that term which was set forth in the first paragraph of that act.

The place in question is "Indian Country" by force of subsequent United States Supreme Court decisions, which have designated what portions of the United States that term shall apply to.

Such a conclusion is clear from a reading of the following from page 561 in the case of *ex parte* Crow Dog, 109 U. S. 556 (1883):

> "In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians. * * *"

That the place in question is "Indian Country" was also pointed out in the case of United States against Chavez, *supra*, wherein the Court, at page 364, said:

> "* * * Section 217, now being considered, like the section considered in that case, was originally a part of the act of 1834. One speaks of 'Indian Country' and the other of an 'Indian Nation or tribe of Indians.' The act as a whole makes it apparent that the term 'Indian Country' was intended to include any unceded lands owned or occupied by an Indian Nation or tribe of Indians, and the term continues to have that meaning, * * *."

Any doubt regarding the fact that the place in question is "Indian Country" is resolved or removed by the United States Supreme Court's decision in the case of United States against Soldana, 246 U. S. 530 (1918). There the Court held that a granting of a mere easement or fee or some other limited interest in the land of the Indians for a highway was not an extinguishment of Indian Title in the land comprised within the right of way.

Regarding this contention, see also Pronovost v. United States, 232 U. S. 487 (1914); United States against Pelican, 232 U. S. 442 (1914).

By Chapter 188 of the Laws of 1881, the State of New York enacted what is now Section 71 of the Indian Law of the State of New York. (App. H to b. p. 40). This act extended all the general laws of the State of New York over the present City of Salamanca except for taxation of the lands of an Indian not a citizen. As appears in the Act itself this piece of legislation was based on the State Legislature's interpretation of Section VIII of the Act of 1875. (App. G to b. pp. 39-40.) The Legislature's error in assuming its right to extend all state laws over this reservation by virtue of the Act of 1875 will be discussed and fully covered further on in this brief under "judicial decisions affecting this reservation."

In 1929 Congress made it clear that the State can extend its laws into the reservation only by consent of Congress, by enacting Section 231 of Title 25 U. S. C. (App. I to b. p. 41.) In that Section, Congress permitted Health Officers of the State to enter upon Indian reservations for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations and school attendance of Indian pupils, as provided by the law of the State under such rules, regulations and conditions as the Secretary of the Interior may prescribe.

One bill now before the House of Representatives and another before the Senate of the United States show that Congress recognizes that state criminal laws do not apply to individuals upon Indian reservations within a state. The applicable portion of the Bill before the House of Representatives is set forth in Appendix J to brief, pp. 41-42. The applicable portion of the Senate Bill is set forth in Appendix K to this brief, p. 42.

The pending bills seek to extend State Laws into Indian Reservations within a State.

(3) Applicable Judicial Interpretations Decisive of the Issue.

(a) Two New York State Appellate Court decisions which sustain appellant's claim.

At the October Term in 1874 and prior to the Congressional Act of 1875 the Appellate Division, Fourth Department and Appellate Court of the State of New York decided that state jurisdiction did not extend into the Allegany Reservation. In the case of Bishop vs. Barton, 2 Hun. Supreme Court Reports of New York, 436, that court, in covering the question of extension of state law into the Allegany Indian Reservation, at page 437, said:

> "* * * Part I of the Revised Statutes, in which the enactment quoted is contained, is entitled 'An Act concerning the territorial limits and divisions, the civil policy, and internal administration of this State,' it was passed as one act, December 3d, 1827. (R. S. 715; Laws of 1827, pp. 1, 2.) Upon the rule of construction adopted by this Court, and by the Court of Appeals in The People v. Molyneux, (53 Barb. 9; 40 N. Y. 113) it is manifest that the statute was intended solely for the government of citizens, and was not intended to embrace affairs pertaining to the Indians or their reservations. Legislation concerning the latter subjects, has never formed a part of the internal administration of the State, within the meaning of that Statute, but has always been quite distinct from that relating to citizens generally. (See Laws 1813 and subsequent statutes, Edm. stat. 4th vol. 342, *et seq.*) This fact strongly confirms the correctness of such construction."

Again in 1927, New York's Court of Appeals, the highest Court in that state, in the matter of Patterson against Seneca Nation, 245 N. Y. 433, 157 N. E. 734; held that the Courts of the State of New York had no jurisdiction to control by mandamus order, running to the government of the Seneca

Nation, the membership of that nation. At page 439 of that case, that court in citing with approval a U. S. Supreme Court decision, remarked:

> "In Kansas Indians (5 Wall. U. S. 737), it was said by Davis, J., that as long as the United States recognizes the national character of the Indian tribes, they are under the protection of treaties and the laws of Congress, 'and their property is withdrawn from the operation of the State laws' ".

(b) *A U. S. Supreme Court case directly in point.*

In the case of Worcester vs. Georgia, 6 Pet. 515 (1832) the U. S. Supreme Court was called upon to decide a like question concerning land reserved to the Indians within that state by virtue of a treaty similar to the one in question. In that case, involving a white man's trespass contrary to State Law, the U. S. Supreme Court held that an attempt by the State Legislature of Georgia to apply its laws to the lands set aside for those Indians, under a treaty, similar to the one in question, was repugnant to the Constitution of the United States and treaties and laws made under it.

That conclusion by the United States Supreme Court is set forth on pages 595 and 596 as follows:

> "Under the administration of the laws of Georgia, a citizen of the United States has been deprived of his liberty; and, claiming protection under the treaties and laws of the United States, he makes the question, as he has a right to make it, whether the laws of Georgia, under which he is now suffering an ignominious punishment, are not repugnant to the constitution of the United States, and the treaties and laws made under it. This repugnancy has been shown; and it remains only to say, what has before been often said by this tribunal of the local laws of many of the states in this union that, being repugnant to the constitution of the

United States, and to the laws made under it, they can have no force to divest the plaintiff in error of his property or liberty."

The treaty making power of the United States Government is dependent on Article I, Section 8, Clause 3 of the Federal Constitution and provides as follows:

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

(c) A U. S. Supreme Court case, involving the reservation in question, which held the Legislature of the State of New York could not extend its laws into these lands.

The first U. S. Supreme Court case, involving this particular reservation, is the case of New York Indians, *supra* decided in 1866. The U. S. Supreme Court in that case decided that the legislature of the State of New York could not extend its laws into this particular locality. At Page 771 of 5 Wallace's Reports, in that case, the Court said:

"It will be seen on looking into the general laws of the State imposing taxes for town and county charges, as well as into the special acts of 1840 and 1841, that the taxes are imposed upon the lands in these reservations, and it is the lands which are sold in default of payment. They are dealt with by the town and county authorities in the same way in making this assessment, and in levying the same, as other real property in these subdivisions of the State. We must say, regarding these reservations as wholly exempt from State taxation and which, as we understand the opinion of the learned judge below, is not denied, the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.

The tax titles purporting to convey these lands to the purchaser, even with the qualification suggested that

the right of occupation is not to be affected, may well embarrass the occupants and be used by unworthy persons to the disturbance of the tribe. All agree that the Indian right of occupancy creates an indefeasible title to the reservation that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of preemption. He is the only party that is authorized to deal with the tribe in respect to their property, and this with the consent of the government. Any other party is an intruder, and may be proceeded against under the twelfth section of the act of 30th June, 1834. * * *"

(d) *A United States Supreme Court denial of certiorari from a United States Circuit Court of Appeals decision holding that the 1875 Congressional Act extended only Highway and Bridge Laws into the locus in quo and that any other statutory or decisional law of the State of New York did not apply to this reservation.*

In 1941 the United States on behalf of the Seneca Nation of Indians sought to enforce cancellation of numerous leases in the present City of Salamanca, for non-payment of rent. The delinquent lessees invoked the state law in an attempt to defeat the forfeiture of said leases. In 1942 the United States Circuit Court of Appeals, Second Circuit (U. S. vs. Forness, 125 Fed. 2nd, 928), decided that such a defense could not be invoked to limit the rights granted to those Indians by virtue of treaties with the United States. Therein that Court at page 932, said: "We conclude then, that the statute did not make the 'law'—Statutory or decisional—of the State of New York applicable to the reservation". In that case, the United States Supreme Court denied Certiorari. (City of Salamanca vs. U. S. 1942, 62 S. Ct. 1293, 316 U. S. 694.)

The opinion of the Circuit Court of Appeals in the Forness case, *supra*, before reaching the above quoted conclusion, at page 932 of 125 Fed. Rep. 2d, pointed out the following as a basis for the unanimous determination of that Court:

> * * * "(2, 3) Appellees argue that this suit, brought by the United States on behalf of the Seneca Nation to enforce the cancellation, is in effect an action of ejectment, and that the action is barred by Sections 997-999 of the New York Civil Practice Act, which provide that upon a tender of the arrears of rent before judgment, the Court shall dismiss the complaint. But state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent. Worcester v. Georgia (1832) 6 Pet. 515, 560, 8 L. Ed. 483; Patterson v. Seneca Nation, 245 N. Y. 433, 156 N. E. 734; Mulkins vs. Snow, 232 N. Y. 47, 51, 133 N. E. 123; cf. The New York Indians, 5 Wall. 761, 18 L. Ed. 708. But, it is argued, such consent to the application of state law was granted by Congress, by the Act of February 19, 1875, which authorized this lease and permitted the laying out of villages on the Cattaraugus and Allegany reservations of the Seneca Nation. Section 8 of that Act provided * * * (App. G. to b., pp. 39-40.)"
>
> "(4-6) Appellees assert, and correctly, that the words 'municipal laws' often are used to refer to the laws of a country dealing with intra-mural matters as distinguished from 'international laws' dealing with its extra-mural affairs. Appellees then go on to insist that the symbol 'municipal laws' has only that single referent, regardless of context. Such an argument involves the 'one-word-one-meaning' fallacy. Similar reasoning would compel the conclusion that a clothes-h[illegible]rse is an animal of the equine species, and make it impossible to speak of drinking a toast. When, as in the statute, the 'laws' of a state of the Union are under

discussion, there can be no intelligent reference to its international or extra-mural laws, for it has none under our Federal Constitution. Appellees' construction would, in effect, read the word 'municipal' out of the statute. 'Municipal laws' of such a state can have but one referent, *i. e.*, the laws of its municipalities. The meaning is the same as when we speak of the 'Municipal Building' of the City of New York. When confronted, as we are here, with a word having two meanings, we should, of course, not select that meaning which gives it the least possible sense in the context in which it is used. In addition to the objection just indicated to appellees' construction, we can find no reason for the specific mention in the statute of state highway and bridge laws if, as appellees contend, all state laws are comprehended in the generic term 'municipal laws.' We conclude, then, that the statute did not make the 'law'—statutory or decisional—of the State of New York applicable to the reservation. The provisions of the New York Civil Practice Act, therefore, do not bar the result asked by the Indians."

Rules of the United States Supreme Court governing the granting of a writ of certiorari and United States Supreme Court decisions controlling the granting of a writ of certiorari establish the U. S. Supreme Court's satisfaction with the law as enunciated in U. S. vs. Forness, *supra*.

This decision had the legal force and effect of nullifying Section 71 of the Indian Law of the State of New York (App. H to b., p. 40) heretofore referred to and discussed in this brief.

This is so because the terms of the 1875 Act (App. G. to brief, pp. 39-40) as decided by the Forness case, *supra*, did not extend New York State Law, other than the State bridge and highway laws into this reservation.

(e) An early U. S. Supreme Court decision holding the Federal Government recognizes the National character of Indian tribes and their protection by treaty and laws of Congress to such an extent as to withdraw their property from the operation of State Laws.

In 1866 the U. S. Supreme Court in the case of The Kansas Indians, 5 Wall. U. S. 737 was called upon to decide whether the State of Kansas could tax treaty protected lands of Indian tribes within that State. At page 757 in that case the Court decided as follows:

> "As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws."

(f) A case involving murder of non-Indian, by non-Indian on reservation.

In the case of Pickett vs. U. S., 216 U. S. 456 (1910) a Non-Indian committed murder on another Non-Indian within the bounds of an Indian Reservation, after the territory within which the crime was committed became a State. There it was held the Federal Government reserved for itself the jurisdiction over crimes committed on Indian reservations which it had before the territory became a State.

This particular reservation in the State of New York, which state was one of the 13 original states, is not subject to laws applying to other reservations in other states, subsequently admitted to the Union. On admission to the Union some of the latter states, in an enabling act, expressly reserved state jurisdiction over offenses of White people on reservations within the boundaries of such states, or, if silent on the subject, state jurisdiction was presumed.

Such an enabling act was valid only where it was not contrary to an existing treaty. Donnelly v. U. S., 228 U. S. 242, (1913).

POINT II.

Treaties made under the Federal constitutional provision and Federal statutes enacted thereunder to cover the offense in question within the *locus in quo* rendered invalid Section 1044, Subdivision 2 of the State Penal Law and Section 1045-A of the same State Law, and the New York State Court erred in holding said State Penal statutes valid and applicable to the place in question without the aid of the heretofore challenged Section 71 of the State Indian Law.

What has been heretofore pointed out and discussed under Point I sustains this point without further argument.

POINT III.

Appellant's commitment and incarceration by virtue of an order of the Supreme Court of the State of New York in violation of what has been set forth under Points I and II of this brief are a violation of appellant's rights guaranteed by Amendment XIV, Section 1 of the Constitution of the United States and appellant is entitled to the remedy of habeas corpus.

Section 1 of the Fourteenth Amendment of the Constitution of the United States, insofar as applicable, provides:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant submits that what has been heretofore pointed out under Point I of this brief shows that the offense is solely within the purview of Federal Law. In view of that, he contends that his "due process" rights under the above-quoted portion of the Constitutional Amendment have been violated. Such a situation entitles Appellant to the remedy of habeas corpus. This is clear from a reading of the case of Worcester against Georgia, *supra*, wherein the U. S. Supreme Court, at page 596, said:

> "* * * This repugnancy has been shown; and it remains only to say, what has before been often said by this tribunal of the local laws of many of the states in this union that, being repugnant to the Constitution of the United States, and to the laws made under it, they can have no force to divest the plaintiff in error of his property or liberty."

Conclusion.

It is respectfully submitted, therefore, that what has been set forth under Point I of this brief establishes that the New York State Court of Appeals erred in the nine different instances charged in the assignment of errors heretofore specified in this brief, and as a consequence thereof violated appellant's "due process" rights of the Federal Constitution as urged in Point III of this brief.

Prayer for Reversal.

Because of the foregoing errors, the appellant, Donald A. J. Ray, prays that the said judgment of the County Court of the County of Wyoming, New York, and the decision of the Court of Appeals of the State of New York

upon which said judgment was entered, in the above-entitled cause, be reviewed by the Supreme Court of the United States and reversed and judgment rendered in favor of the Appellant, with costs in all courts.

Respectfully submitted,

THOMAS J. McKENNA,
Attorney for Petitioner-Appellant,
Office & P. O. Address,
706 Morgan Building,
Buffalo, New York.

APPENDIX A.

Treaties and Statutes Involved.

The particular treaty involved (Vol. 7 Stat. at Large 44) Nov. 11, 1794.

Proclamation, Jan. 21, 1795.

A TREATY BETWEEN THE UNITED STATES OF AMERICA, AND THE TRIBES OF INDIANS CALLED THE SIX NATIONS.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE III.

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong-yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of

Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, about fort Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser being the eastern boundary of a strip of land, extended from the same line to Niagara river, which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelp's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V.

The Senake nation, all others of the Six Nations concurring, cede to the United States the right of making a wag-

gon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbours, and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing cloathing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United Stateas and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation

shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

IN WITNESS whereof, the said Timothy Pickering, and the Sachems and War-chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Kon-on-daigua in the State of New York, the eleventh day of November, in the Year one thousand seven hundred and ninety-four.

TIMOTHY PICKERING.

APPENDIX B

Necessary Portion of Treaty Making Treaty of 1794 Applicable. (7 Stat. at Large 586.)

May 20, 1842
Proclamation,
Aug. 26, 1842.

ARTICLES OF A TREATY

Made and concluded at Buffalo Creek, in the State of New York, on the twentieth day of May in the year one thousand eight hundred and forty-two, between the

United States of America, acting herein by Ambrose Spencer their Commissioner, thereto duly authorized, on the one part, and the chiefs, headmen and warriors of the Seneca nation of Indians, duly assembled in council, on the other part.

WHEREAS a treaty was heretofore concluded, and made between the said United States, and the chiefs, headmen and warriors of the several tribes of New York Indians, dated the fifteenth day of January in the year one thousand eight hundred and thirty-eight which treaty having been afterwards amended, was proclaimed by the President of the United States, on the fourth of April one thousand eight hundred and forty, to have been duly ratified.

And whereas divers questions and differences having arisen between the chiefs and headmen of the Seneca nation of Indians or some of them, and the said Thomas Ludlow Ogden and Joseph Fellows in relation to the said indenture and the rights of the parties thereto, and the provisions contained in the said indenture and the rights of the parties thereto, and the provisions contained in the said indenture being still unexecuted, the said parties have mutually agreed to settle, compromise and finally terminate all such questions and differences on the terms and conditions hereinafter specified.

Now therefore, it is hereby mutually declared, and agreed, by and between the said parties as follows:

ARTICLE FIRST: The said Thomas Ludlow Ogden and Joseph Fellows in consideration of the release and agreements hereinafter contained, on the part of the said Seneca nation do on their part consent, covenant and agree that they the said nation (the said indenture notwithstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden, and Joseph Fellows the right of preemption, and all other the right and title which they then had or held in or to the said tracts of land.

APPENDIX C.

Section Dispensing with Treaties but Reserving Existing Rights of Pre-existing Treaties.

Act of March 3, 1871

Section 2079 Rev. Stat., Sec. 71 of Title 25 U. S. C.

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.

APPENDIX D.

Subdivision of Federal Statute Providing for Territorial Jurisdiction of Offense and Statute Setting Forth Facts which Make Offense of Murder, First Degree.

Section 451 of Title 18 U. S. C. insofar as applicable provides:

> "(Criminal Code 272) Places and Waters applicable: on board American vessel on high seas or Great Lakes; on land under exclusive control of United States; Guano Islands.
> The crimes and offenses defined in this chapter shall be punished as herein prescribed."

Subdivision 3 thereof provides as follows:

> "When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

Section 452 of Title 18 U. S. C. provides as follows:

"(Criminal Code, Section 273.) Murder; first degree; second degree; Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed is murder in the first degree. Any other murder is murder in the second degree. (R. S. Sec. 5339; Mar. 4, 1909, c. 321, Sec. 273, 35 Stat. 1143.)"

APPENDIX E.

Statute which Extends Crime in Question to City of Salamanca.

Section 217, Title 25 U. S. C. reads as follows:

"Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country. (R. S. Sec. 2145.)"

APPENDIX F.

House Record, Disclosing Acknowledgment that only Congress can Legislate for this Reservation and Recognition of Judicial Decision that State Law cannot be Extended into Reservation.

House Misc. Doc. No. 75, 43d Cong., 2d sess. (1875) reads as follows:

On motion of Mr. Scudder:

Whereas the legislature of the State of New York, has, at different times, ratified on confirmed leases between Indian and white settlers on the Allegany Indian reservation in said State; and,

Whereas the courts of this State have decided that said ratification is null and void, the Congress of the United States alone possessing power to deal with and for the Indians, and that as Judge Barker, of the supreme courts of this State, in an elaborate opinion, given in a suit to test the legality of such ratification of leases, did say that State action alone cannot accomplish the results; that the State should, through its legislature and executive officers, take appropriate steps to secure the aid and co-operation of the United States to secure to the white settlers the ratification of their leases, and to protect them in their rights: Now, therefore,

RESOLVED, (IF THE SENATE CONCUR), That our Senators and Representatives in Congress are requested to lay the matter before Congress at an early day, and procure the passage of a law, or take some action for the relief of said white settlers.

RESOLVED, (IF THE SENATE CONCUR), That a copy of this resolution be furnished to each of the members of the Senate and Congress from this State.

By order: HIRAM CALKINS, Clerk.

IN SENATE, February 2, 1875.

Concurred in without amendment.

By order:

H. A. GLIDDEN, Clerk.

APPENDIX G.

Applicable Portion of Act of Feb. 19, 1875 Based on State's Request which Apparently was Relied on as a Source of New York State Court Jurisdiction. (Ch. 90, 18 Stat. L. 330.)

Section 8 of Act

"That all laws of the State of New York now in force concerning the laying out, altering, discontinuing,

and repairing highways and bridges shall be in force within said villages, and may with the consent of said Seneca Nation in council, extend to, and be in force beyond said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: Provided, nevertheless, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States."

APPENDIX H.

Applicable Portion of Section of New York Statute which Purports to Extend General Laws of State over City of Salamanca.

Sec. 71, Indian Law of New York State, Ch. 188 of New York laws of 1881.

Amended by Law of 1915, Ch. 339.

"Exclusion of villages from reservation; lease of lands therein; certification of copies of leases granted by the Seneca nation of Indians and recording thereof."

Those parts of the Allegany reservation included in the Village of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, as surveyed, located and established pursuant to an act of Congress approved February nineteenth, eighteen hundred and seventy-five, had been constituted parts of the several towns within which they are located, and all the general laws of the state are extended over and apply to the same; except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States."

APPENDIX I.

Act of Congress in 1929 Showing Congressional Intent that State can only Extend its Laws into Reservation by Consent of Congress.

Section 231 of the Title 25 U. S. C.

Enforcement of State laws affecting health and education; entry of state employees on Indian lands.

The Secretary of the Interior shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or to enforce compulsory school attendance of Indian pupils as provided by the law of the State, under such rules, regulations and conditions as the Secretary of the Interior may prescribe. (Feb. 15, 1928, c. 216, 45 Stat. 1185.)

APPENDIX J.

Applicable Portion of a Recent Bill in House of Representatives which Shows Recognition by that Body that Place in Question Is not Subject to Criminal Laws of State.

79th Congress
1st Session

H. R. 3710 (July 6, 1945)

To Emancipate the Indians of the United States.

Sec. 4. (b) All Indian reservations, all persons upon such reservations, and all Indians, within any State, shall be subject to the criminal laws of such State to the same extent and in the same manner as other places and persons within such State.

(c) The Secretary of the Interior shall permit the agents and employees of a State or county in which an Indian reservation is located to enter upon such reservation for the purpose of enforcing such laws, under such rules, regulations, and conditions as the Secretary may prescribe.

(d) The Secretary of the Interior is authorized to enter into agreements with the several States, and the counties thereof, in which Indian reservations are located, to pay to such States or counties such amounts as he may determine to be proper to defray the expenses of the enforcement of the criminal laws of such States on such reservations.

APPENDIX K.

Applicable Portion of a Recent Bill in Senate which shows Recognition by that Body that Place in Question Is not Subject to Criminal Laws of State.

79th Congress
1st Session

S. 1179 (June 21, 1945)

To Provide for the Enforcement of the Penal Laws of the States on Indian Reservations and for Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all Indian reservations, all persons upon such reservations, and all Indians, within any State, shall be subject to the criminal laws of such State to the same extent and in the same manner as other places and persons within such State.

APPENDIX L.

Section of State Law Defining Crime and Section Governing Punishment.

Section 1044 of the Penal Law of the State of New York: Murder in first degree defined.

"The killing of a human being, unless it is excusable or justifiable is murder in the first degree, when committed:

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise, * * *." (Section derived from penal code, Sec. 183 L. 1881 C. 676 as amended by L. 1882 C. 384, Sec. 1; Penal Code 183-a as added by L. 1897 C. 548, Sec. 1.)

Section 1045-a of the Penal Law of the State of New York: life imprisonment for felony murder; jury may recommend

"A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life." (Added L. 1937, C. 67, Sec. 2, eff. Mar. 17, 1937.)

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 11 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*,
DONALD A. J. RAY,
Petitioner-Appellant,

vs.

WALTER B. MARTIN, as Warden of Attica State Prison,
Attica, New York,
Appellee.

APPELLANT'S REPLY BRIEF.

THOMAS J. McKENNA,
Attorney for Petitioner-Appellant,
Office & P. O. Address,
706 Morgan Building,
Buffalo, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*
DONALD A. J. RAY,
Petitioner-Appellant,
vs.
WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York,
Appellee.

APPELLANT'S REPLY BRIEF.

POINT I.

The cases and governmental documents, relied on by opposing counsel in their briefs, fail to defeat appellant's claim.

Davis v. Johnston, 144 F. 2d 862, 9th Cir. 1944; cert. den., 323 U. S. 789, 819.

That case intimates that Appellant is not entitled to the remedy of habeas corpus. It held that where jurisdiction of the trial court is in issue and is dependent upon facts

alleged, the finding of jurisdiction is conclusive on the parties in a collateral attack regardless of whether question of jurisdiction was raised by accused. It is distinguishable from the present case because the indictment in this case simply alleged that the crime was committed within the City of Salamanca, and the County of Cattaraugus, as a jurisdictional allegation. There is no dispute as to that and no collateral attack is, or could be, made on that allegation. Appellant's position on that point is clearly sustained by the following cases:

Worcester v. State of Georgia, *Supra;*
Ex parte Crow Dog, *Supra;*
Bowen v. Johnston, 306 U. S. 19 (1939);
Hawk v. Olsen, Decided by this Court at the October Term, 1945, and appearing in U. S. Supreme Court Law. Ed. Advance Opinions, Vol. 90—No. 2, Page 67;
Indians v. Chicago Tolletsome Club, 53 Fed. 18 (1892) and
Wick v. U. S., 29 F. 191 (1923).
New York v. Dibble, 21 Howard 366, Affirming 16 N. Y. 203.

Confusion in connection with this case can be eliminated by reference to New York Indians, (5 Wal. 761, page 763), Treaty of 1838, (7 Stats. at large 550), Treaty of 1842, (7 Stats. at large, 586), Treaty of 1857 (11 Stats. at large, 735), and the citations of the case.

By looking to 16 N. Y. 203, it will be discovered that the facts in the Dibble case arose in 1853 and by reference to 21 How. 366, it will be noted that the decision in that case was made at the December term in 1858. By reference to the Treaty of 1857, it will be observed that that treaty was

proclaimed on March 31, 1859. By reference to the Treaties of 1838 and 1842 and what was said in the statement of the case in New York Indians, 5 Wall, at page 763, it will be observed that between April 3, 1845 and March 31, 1859, the Tonawanda Reservation, unlike the Allegany Reservation, was subject to extinguishment of the Indian Title and, therefore, susceptible to having the laws of the State of New York extended into that reservation.

Appellant's claim, regarding this distinction between the Tonawanda Reservation and the Allegany Reservation, is sustained by the case of United States v. National Gypsum Company, *et al.*, 141 Fed. Supp. 2d 859, decided in March, 1944 by the Circuit Court of Appeals, Second Circuit.

> United States, *ex rel.* Kennedy v. Tyler, 269 U. S. 13, Affirming in part United States v. Waldow, 294 Fed. 111.

The District Attorney's brief cites United States v. Waldow, 294 Fed. 111 but fails to set forth that that is the same case which was appealed to the United States Supreme Court and decided as Kennedy v. Tyler in 269 U. S. 13. That Supreme Court case is distinguishable and not applicable to the present situation. The United States Supreme Court held that the Court below should have dismissed the writ on the theory that petitioner should have first exhausted his remedy in the state court and not on the merits. The three following excerpts, from the Matter of Patterson v. Seneca Nation, 245 N. Y. 433, show the Tyler case does not support respondent's contention:

> "It is true that in the recent case of United States *ex rel.* Kennedy v. Tyler (269 U. S. 13) the Supreme Court of the United States stated that the State of New York, as early as the year 1849, 'assumed governmental control' of the Indians at their request, created and de-

fined the jurisdiction of the Peacemakers Court, and administered the laws enacted 'through its courts.' We do not understand, however, that that court undertook to define, for the courts of the State, the relation between the State and the Seneca Indians, or to determine that the statutes of the State applied to the tribal Indians, or that its courts had jurisdiction over them. On the contrary, it expressly declined to make the determination saying: 'In the regular and ordinary course of procedure, the power of the highest State court in respect of such questions should first be exhausted'." (Pages 440-441.)

"It was not accurate to say, therefore, that the State of New York in the year 1849 'assumed governmental control' of the Indians. On the contrary, in that year and subsequently, by its approval of the Indian constitution in its original and amended form, the State of New York acknowledged the Seneca Indians to be a separate nation, a self-governing people, having a central government with appropriate departments to make laws, to administer and to interpret them." (Page 443.)

"It does not otherwise make applicable to Indians either the common law or statute law of the State, whether civil or criminal." (Page 445.)

Bates v. Clark, 95 N. Y. 204.

This case was decided by the United States Supreme Court at its October Term in 1877 and before the adoption of the Revised Statutes in 1878. It decided that all the country described by the Act of 1834 as Indian Country remains Indian Country so long as the Indians retain their original title to the soil and ceases to be Indian Country whenever they lose that title in the absence of any different provision by treaty or by act of Congress. It, in no way, undertook to decide whether any reservation within any of the original thirteen states was Indian Country and in no

way undertook to reverse or modify the decision in the United States Supreme Court case of Worcester v. Georgia, 31 U. S. 515, 6 Pet. 515, which case, as pointed out on Pages 23 and 24 of Appellant's Main Brief, was decisive as to state rights within the Allegany Reservation. See, regarding this case Vol. 24, 1939-40, Minnesota Law Review, pages 147 to 151.

Ex parte Kan-Gi-Shunca or *Ex parte* Crow Dog, 109 U. S. 556.

This case, decided by the United States Supreme Court in 1883, eliminated any doubt concerning what should be considered "Indian Country" after the adoption of the Revised Statutes in 1878.

One of the purposes of that decision was to make clear the distinction as to what was "Indian Country" under the Act of 1834 and what portion of the country that term was to apply to after the adoption of the Revised Statutes. The quoted portion of that opinion applicable to this case and showing that the place in question is Indian Country is set forth on Page 19 of Appellant's Main Brief. See also regarding this case, pages 150 to 153 of Vol. 24, 1939-40 of the Minnesota Law Review.

Benson v. United States, 44 Fed. 178.

This case, decided on November 12th, 1890, by the Second Circuit, was an opinion by a divided court and no attempt was made to appeal from that case to the United States Supreme Court. While it is true that the case did decide that the City of Salamanca was not Indian Country, it is clear from the opinion that that Court, for its decision, relied on the mistaken notion that the decision in the case of Bates v. Clark, *Supra*, was made subsequent to the adoption of the Revised Statutes.

This error by the Circuit Court was pointed out in the opinion of Justice Knight in U. S. v. National Gypsum Company, 49 Federal Supp. 206, reversed by the United States Circuit Court of Appeals, 2d Circuit, March 31, 1944, in 141 Fed. 2d 859, on another point. That opinion quoted from U. S. vs. Leathers, 26 Fed. Cas. No. 15,581, P. 897, 899. As heretofore pointed out in the briefs, the definition of the term "Indian Country" in Bates vs. Clark limited the term to that portion of the country described in the Act of 1834, while the subsequent decision in the Crow Dog Case, *Supra*, in 1883, quoted the definition in the Bates Case so that it would be compared with the enlarged definition which was to apply hereafter under the Revised Statutes. That definition and all subsequent United States Supreme Court decisions on that question eliminated any doubt that this reservation is Indian Country.

Comparison of what that Court said in its opinion in interpreting the definition "Indian Country" in the Crow Dog Case, *Supra*, when compared with the Supreme Court's definition in that case and subsequent United States Supreme Court cases which reiterated and explained the definition in the Crow Dog case, *Supra*, reveal that the Circuit Court misread and misinterpreted the definition. Furthermore, that case neglected to confine the Dibble Case, *Supra*, which dealt solely with the Tonawanda Reservation to that particular reservation and the different treaties governing that reservation. That the Dibble case, *Supra*, did not apply to this reservation has heretofore been pointed out in this brief.

Seneca Nation v. Christie, 126 N. Y. 122.

The United States Supreme Court in 162 U. S. 283, at pages 289 and 290, held that a writ of error could not be

maintained because the Court of Appeals decision was based on grounds, not involving a federal question.

United States v. Bailey, 1 McLean 234.

The decision in this case purports to have been made in 1834 and reported by Hon. John McLean, Circuit Justice. This case was decided prior to the Federal Act of March 3rd, 1871 (App. C to Appellant's Main Brief, Page 37), which dispensed with treaties and as a consequence left Indian matters to Congress. This case did not undertake to decide that state laws could not be extended into Indian Reservations within a state as decided in Worcester v. Georgia, *Supra*, in 1832. It is difficult to acquiesce in the Attorney General's claim that this decision was made by the same Justice McLean who had participated in the United States Supreme Court decision in the case of Worcester v. Georgia, *Supra*, two years before. This is so because of the opinion in the prior case and following from the opinion in that case on page 239, wherein the Court said:

> "The state of New York, for many years has punished its citizens for crimes committed in the Indian territory within its limits; and the state of Georgia, before its laws were extended over the Cherokee country, within the state, punished its own citizens for offences committed within that territory; and we are not aware that the right of either state to do this has been questioned."

By comparing the above quoted with the following from page 560, of Worcester v. Georgia, *Supra*, it will be seen that the United States Supreme Court had, two years before, definitely decided that the State of Georgia could not extend its laws into the Cherokee Reservation within the State of Georgia:

> "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurate-

ly described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress."

United States v. McBratney, 104 U. S. 621 and Draper v. United States, 164 U. S. 240.

These cases have no application to this case because they involve the question of jurisdiction of Indian Lands in states admitted by an enabling act. As heretofore pointed out, this reservation is within the State of New York, which was one of the thirteen original states and under a treaty similar to the one involved in the case of Worcester v. Georgia, *Supra*.

Two cases, (pages 14, 15 of Attorney General's Brief) one involving murder of an Indian by an Indian, and the other involving the murder of a white man by an Indian, are offered by respondents to show that New York State Courts exercised criminal jurisdiction over Indian Reservations within the state, between 1802 and 1821. Such cases only tend to establish the New York State Courts acted contrary to law as evidenced from the subsequent decisions in the Worcester vs. Georgia case, *Supra*, the Crow Dog case, *Supra*, and U. S. vs. Boylan, *et al.*, 265 Fed. 165.

Numerous cases and governmental documents have been cited by opposing counsel. Such cases and the effect of such documents are either distinguishable or not applicable. This contention is to be evidenced by comparing such with what has been pointed out in Appellant's Main Brief and the analysis of cases under this point.

POINT II.

Arguments of opposing counsel, in their briefs and the various reasons, relied upon in some of the prior opinions in this case, fail to defeat appellant's claim.

Respondents and some of the prior opinions in this case, while conceding such to be not controlling, point out that an unchallenged practice, indulged in by the state court, of extending its jurisdiction into this reservation should be accepted as giving weight to the fact that the state court could extend its jurisdiction into this territory. It was on such a theory condemned by the Allied Nations, that Hitler invaded certain European countries, claiming that the laws of Germany followed German settlers having migrated to those countries prior to such invasion. He insisted that the laws of Germany should be extended into those countries to protect such settlers or "German minorities."

Any direct allusion, intimation or inference to the effect that a reversal in this case would deprive the lessees of the lands in question of the benefit of white man's laws in a white man's city is apparently an oversight of the fact that the applicable Federal laws should not be classified as barbaric.

In connection with any such intimation or inference it should be noted that the welfare and protection of the Indians living on the Allegany and Cattaraugus Reservations are still a matter of national concern.

That those Indians have good cause to oppose being subjected to State laws is to be evidenced from a reading of U. S. vs. Forness, 125 Fed. 2d, 928, which case is discussed and quoted on pages 25 to 28 of appellant's main brief.

Also illustrative of what the Indians are to expect in civil cases, if subjected to the jurisdiction of New York State Courts, is to be found in the case of Marion John as Administratrix, etc., v. M. Murphy and Son, Inc., *et al.*

In that case the widow sued in the State Court in a negligence action for the death of her husband on behalf of herself and her children. A jury of white men within the County of Cattaraugus returned a verdict of no cause of action. The Trial Court set the verdict aside on the ground that the facts were clearly such as to have entitled her to a verdict. The Appellate Division, on March 10, 1943, sustained the Trial Court. (Case No. 8 in Vol. 2733, of Cases and Points of New York Supreme Court, Appellate Division, Fourth Department; 41 New York Supp. 2d Series 184.) If subjected to state jurisdiction, these Indians, involved in litigated matters, will be at the mercy of a jury, which will, in most instances, include lessees of their lands who resent paying, or refuse to pay the small rentals charged under the long term leases.

The federal law, aside from providing adequate laws and procedure, adopts by reference any state penal law not included in the federal laws (section 468, Title 18 U. S. C.). Such adopted crimes are, however, prosecuted in the Federal Courts.

(Puerto Rico vs. Shell Co., 302 U. S. 263, p. 266, citing U. S. vs. Press Pub. Co., 219 U. S. 1; Franklin vs. U. S., 216 U. S. 559.)

The attention of this Court is directed to the fact that the occupants of these lands fail to contribute to the state tax burden imposed on the lands of other residents of the State of New York. (18 Stat. 330, ch. 90, Sec. 8). For that

reason they should not be entitled to complain, when deprived of the benefit of State Laws which would operate to their convenience and the detriment of the Indians.

They have sought occupancy of those tax-free and low rental lands for their own enrichment. The selfish purposes of a large number of those occupants to invoke state law to evade cancellation of their leases, because of nonpayment of a small rental, was exposed in the Forness case, *supra*. Such clearly evidenced one of the many such reasons for seeking to extend the state laws into those lands.

Respondents in their argument and some of the Courts in their opinions in this case went to great lengths to search out material which would overrule the interpretation of the word "municipal" by the United States Circuit Court of Appeals in the Forness case, *supra*. They overlooked the General Municipal Law of the State of New York. Section 2 of that law defines the term "municipal corporation" as follows:

> "The term 'municipal corporation' as used in this chapter, includes only a county, town, city and village. The term 'governing board' includes the board of Supervisors of a county, the town board of a town, the common council of a city, and the board of trustees of a village."

In addition to overlooking the definition itself, they have also overlooked what appears on page 2 of McKinney's General Municipal Law under the title "Consolidators' Notes on the General Municipal Law" and the historical note following that.

Although appellant feels that the facts in the affidavit of Charles E. Congdon submitted by respondent, (R. 16 to

20) are in no way necessary for a determination of this issue, the attention of this Court is directed to the fact that he was the attorney for the Forness family in the United States Circuit Court of Appeals in the Forness case, *supra*.

Furthermore, in connection with that affidavit, attention is called to the fact that it is somewhat in the form of a brief and deals with some of the facts in a general way. For that reason, the affidavit should be read in connection with the facts as outlined in three recent cases. Those cases are:

Forness case, *supra*.
Wood against City of Salamanca, 289 N. Y. 279.
Salamanca against Seneca Nation, 47 F. Supp. 939.

The Circuit Court of Appeals Record in the Forness case reveals that of the 1,881 leases outstanding in 1911, 1,095 were in default, the total arrears amounting to $16,356.34 (R. 265, 273-277).

The Wood case, *supra*, discloses that there are 800 forfeitures existing and that this amount is being increased.

Respectfully submitted,

THOMAS J. McKENNA,
Attorney for Appellant,
Office & P. O. Address,
706 Morgan Bldg.,
Buffalo, N. Y.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 6 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. DONALD A. J. RAY,
Petitioner-Appellant,

vs.

WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York,
Appellee.

BRIEF ON BEHALF OF CATTARAUGUS COUNTY, APPELLEE IN CERTIORARI GRANTED OCTOBER 8, 1945, ON PETITION FOR CERTIORARI FILED JUNE 23, 1945, TO REVIEW JUDGMENT OF COUNTY COURT OF WYOMING COUNTY, NEW YORK STATE, AND THE DECISION OF THE COURT OF APPEALS OF THAT STATE UPON WHICH SAID JUDGMENT WAS ENTERED.

CHARLES E. CONGDON,
Assistant District Attorney,
Attorney for Appellee,
Office & P. O. Address,
107 Main St.,
Salamanca, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

SUBJECT INDEX.

	PAGE
Table of Cases, etc.	II
Facts of this Case	1
Summary of Argument	4
Point 1	4
Point 2	12
Point 3	20
Point 4	21

Opinions Below.

The opinion of the District Court (R. 7-12) is reported at 54 Fed. Supp. 218.

The opinion of the Circuit Court (R. 12-13) is reported at 141 Fed. 2d. 300.

The opinion of Wyoming County Court (R. 20-33) is reported at 181 Misc. 925.

The opinion of the Appellate Division, Fourth Department (R. 36-39) is reported at 268 A. D. 218.

The opinion of Court of Appeals (R. 43-55) is reported at 294 N. Y. 61.

PAGE

Table of Cases and Statutes.

Benson vs. U. S., 44 Fed. 178 13
Clark vs. Smith, 13 Peters 195 8
Draper vs. United States, 164 U. S. 640 19
Eaton vs. West Virginia, 91 Fed. 760 21
Fletcher vs. Peck, 6 Cranch 142 8
Harcourt vs. Gaillard, 12 Wheaton 523 5
Hatch vs. Luckman, 155 A. D. 765 16
Jimeson vs. Pierce, 78 A. D. 9 16
Johnson vs. M'Intosh, 8 Wheaton 543 5
Kan-gi-Shun-ca, *ex parte*, 109 U. S. 556 14
New York vs. Dibble, 21 How. 366 14
People *ex rel.* Cusick vs. Daley, 212 N. Y. 183 13
Robb vs. Connelly, 111 U. S. 637 21
Royall, *ex parte*, 117 U. S. 248 21
Seneca Nation vs. Christie, 126 N. Y. 122 16
U. S. vs. Forness, 125 Fed. 2nd 928 20
U. S. vs. McBratney, 104 U. S. 621 18
U. S. vs. Waldow, 294 Fed. 111 ..... 16, 21
Worchester vs. Georgia, 6 Peters 580 10

U. S. Code.

Sec. 217 13
Sec. 451 12
Sec. 452 14
Sec. 548 13

U. S. Statutes.

18 Stat. 330, 1875 19
29 Stat. 558, 1890 19

Laws of New York.

New York Indian Law, Sec. 71 19
Laws of 1913, page 507 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. DONALD A. J. RAY,
Petitioner-Appellant,

vs.

WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York,
Appellee.

BRIEF ON BEHALF OF CATTARAUGUS COUNTY, APPELLEE IN CERTIORARI GRANTED OCTOBER 8, 1945, ON PETITION FOR CERTIORARI FILED JUNE 23, 1945, TO REVIEW JUDGMENT OF COUNTY COURT OF WYOMING COUNTY, NEW YORK STATE, AND THE DECISION OF THE COURT OF APPEALS OF THAT STATE UPON WHICH SAID JUDGMENT WAS ENTERED.

Facts of this Case.

On the 16th day of September, 1939 the body of Paul M. Balsiger was discovered in a car parked on Wildwood Avenue in the city of Salamanca, County of Cattaraugus and State of New York. Wildwood Avenue is a street which, in its entirety, lies within the corporate limits of the city of Salamanca. Paul M. Balsiger was a resident of the city of Bradford, Pennsylvania, and a white man, who had never

been enrolled as a member of any of the New York Indian Tribes, which fact is stipulated.

By an indictment handed up to the Supreme Court for the County of Cattaraugus at the September 1939 term, Donald A. J. Ray was charged with the murder of Paul M. Balsiger in two counts. The first count charging murder in the first degree from a deliberate and premeditated design to effect the death of the decedent and the second count charging murder in the first degree in that Donald A. J. Ray did shoot and kill Paul M. Balsiger with a loaded firearm when he, the said Donald A. J. Ray, was engaged in the commission of a felony, that is, the crime of robbery.

Upon this indictment defendant Ray was brought to trial in the Supreme Court in Cattaraugus County on the 4th day of December, 1939 and thereafter on the 11th day of December, 1939, the count of premeditated murder having been dismissed, Ray was found guilty of murder on the felony count and was sentenced on the 15th day of December, 1939 to be imprisoned in the State Prison at Attica, New York for the term of his natural life.

It appears from the record taken in open court at the time of the defendant's conviction that he was a citizen of the United States and by his own affidavit in the moving papers applying for the writ of habeas corpus, he states that he is a white man.

On June 28, 1940 the conviction of the defendant Ray was affirmed by the Appellate Division of the N. Y. Supreme Court. Subsequently an application for leave to appeal to the N. Y. Court of Appeals was denied. The question raised on this application involved points of fact and law concern-

ing murder by premeditation and felony murder and have no bearing upon the jurisdictional question.

At no time has the defendant, prior to his application to the Federal Court for the Western District of New York, raised the question of the jurisdiction of the State of New York to prosecute the charges brought against him by the indictment aforesaid, and nowhere in the record does it appear that the defendant ever questioned the jurisdiction of the State of New York.

Ray, the defendant above-named, made application under date of March 31, 1943 (R. 4), to the United States District Court, Western District of New York to be heard on a motion for the granting of a writ of habeas corpus.

On the 26th day of April, 1943, arguments were presented by the petitioner, and in opposition thereto by the Attorney General of the state of New York on behalf of the Warden of Attica State Prison, by the United States Attorney for the Western District of New York and by the County of Cattaraugus.

An opinion of the Honorable John Knight, United States District Judge, filed July 19, 1943 (R. 7), denied the writ, on the ground that petitioner could not invoke jurisdiction of the District Court until he had exhausted his remedies in the state courts and secondly, that the Penal Laws of the State of New York governed the acts for which this defendant was convicted and that the Supreme Court of the State of New York had jurisdiction of the crime.

This decision was appealed to the Circuit Court of Appeals, where it was affirmed (R. 12) and thereafter the

matter was initially presented to the New York State courts by writ of habeas corpus (R. 3) sued out before the county judge of Wyoming County. The County Court having denied the writ (R. 20) and the denial having been affirmed by the Appellate Division (R. 35), an appeal was taken to the N. Y. Court of Appeals, which affirmed the previous order (R. 55). From this decision of the New York State Court of Appeals this certiorari has been granted (R. 63).

Summary of Argument.

Point One will review the History of the Allegany Reservation upon which the crime was committed.

Point Two will show that the jurisdiction of the courts of the United States is not exclusive on this Reservation and therefore the New York State Courts have jurisdiction.

Point Three will suggest that the writ of habeas corpus is not a proper remedy in this case.

POINT ONE.

The sovereignty of the State of New York attaches to the lands of the Seneca Indians comprised within the boundaries of the State of New York.

The nature of the Indian title to lands on this continent was established by the system of public law adopted by European nations regarding their possessions here. It became the recognized principle that discovery followed by possession, vested in the sovereign by whose subjects the discovery was made the absolute title to the soil of the lands within the limits of the discovered territory, subject, how-

ever, to the right of the occupation by the Indian tribes, which could only be extinguished by their voluntary consent, unless forfeited under the laws of war.

The title of the crown was subject to grant, but a grant from the crown only conveyed the fee, subject to the right of Indian occupation and when that was extinguished under the sanction of the crown, the possession then attached to the fee and the title of the grantee was perfected. These general principles were announced by Chief Justice Marshall in the case of Johnson vs. M'Intosh (8 Wheaton 543) which has ever since been regarded as a sound exposition of the nature of Indian rights.

By the Declaration of Independence the colonies became sovereign states and were so acknowledged by the Treaty of Peace of 1783 and Great Britain by that Treaty "relinquished all claims to the *government, property* and *territorial* rights" within the several colonies. It is the received opinion that the colonies succeeded to the rights and title of the crown to all the unclaimed lands within their respective boundaries, with the exclusive right to extinguish by purchase the Indian title, and to regulate dealings with the Indian tribes. "There was no territory in the United States," said Justice Johnson in Harcourt vs. Gaillard (12 Wheaton 523) "that was claimed in any other right than that of one of the Confederated States; therefore, there could be no acquisition of territory made by the United States distinct from or independent of some one of the United States."

A controversy had arisen between the colonies of New York and Massachusetts, prior to the Revolution, respecting the right of sovereignty and jurisdiction over a large territory within the chartered limits of the province of New

York, which was claimed by Massachusetts to be included within the limits of the earlier charter of the colony of Massachusetts Bay.

This dispute was still unsettled after the Articles of Confederation were adopted and was then brought by Massachusetts to the attention of the Congress of the Confederacy, by petition praying for the appointment of commissioners for the settlement of its claim under the provisions of Article Nine of the Articles of Confederation. Congress was proceeding to appoint commissioners, when further action on its part was arrested by the appointment, by voluntary agreement between Massachusetts and New York State, of commissioners to adjust the controversy.

These commissioners in behalf of their respective states entered into a compact on the 16th day of December, 1786 whereby *Massachusetts ceded to the state of New York the right of government, sovereignty and jurisdiction over the whole territory in dispute*, and New York ceded to Massachusetts the right of preemption of the soil and to extinguish the Indian title to about six million acres of land in the western part of the state of New York, described in the treaty, Massachusetts surrendering to New York all claims to any other territory therein. By the Ninth Article of this Compact, Massachusetts was authorized to treat with the native Indians for acquiring the right of soil in the territory to be ceded to Massachusetts.

The Tenth Article is as follows:— "Tenthly, the Commonwealth of Massachusetts may grant the right of preemption of the soil of any part of said lands and territories to any person or persons, who by virtue of such grant, shall have good right to extinguish by purchase the claims of the

native Indians, providing, however, that no purchase from the native Indians by such grantees shall be valid, unless the same shall be made in the presence of or approved by a superintendent to be appointed for such purpose by the Commonwealth of Massachusetts, and having no interest in such purchase, and unless such purchase shall be confirmed by the Commonwealth of Massachusetts."

This Compact, after the adoption of the Constitution of the United States, was formally ratified and approved by Congress, whose consent was made necessary both by the Articles of Confederacy and by the Federal Constitution to any Compact between the states. In 1791 the State of Massachusetts conveyed its title and interest in and to above five million acres of land, ceded to it by the treaty of 1786, subject to the Indian right, to Robert Morris of Philadelphia, who subsequently conveyed the greater portion to persons constituting the Holland Land Company. This conveyance was accompanied by an agreement by Morris to extinguish the Indian rights.

On the 15th of September, 1797 at a public council of the Seneca Indians held at Geneva, in the County of Ontario, the Indians conveyed to Robert Morris all the lands embraced in this purchase from Massachusetts *excepting certain Indian reservations.* It is recited in the conveyance that it was made "at a treaty held under the authority of the United States by the Honorable Jeremiah Wadsworth, a Commissioner appointed by the President of the United States, to hold the same." There was also present at that treaty a commissioner on the part of Massachusetts, *This treaty was between the Indians and Morris under the supervision of the Commissioner named.* It was not a treaty between the United States and the Indians. This grant is the

origin of the title derived from the Indians to the lands known as the Holland Purchase and the Morris Reserve in this state.

Among the reservations excepted by the Seneca Indians was a tract containing 42 square miles lying on each side of the Allegany River and extending from the Pennsylvania line northeastward about 25 miles. It is upon this tract now known as the Allegany Reservation that most of the corporate limits of Salamanca lie and within the boundaries of which tract in the city of Salamanca the crime for which Donald A. J. Ray was convicted was perpetrated.

There was also a controversy between the states and the United States as to the unclaimed lands extending indefinitely westward far beyond the limit of settlement, and whether the colonial charter could be fairly construed to include these indefinite regions, which controversy, however, was happily compromised by cessions made by six of the states to the United States of territory claimed by them, commencing with that of New York on March 1, 1781 and including the memorable cession of the Northwest Territory by Virginia in 1784. (See Clark vs. Smith, 13 Peters 195; Fletcher vs. Peck, 6 Cranch 142.) This was the beginning of the acknowledged territorial possession of the government of the United States, subsequently largely increased by purchases from France and Spain.

The original states before and after the adoption of the Federal Constitution assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdiction. They exercised the power, which had before been vested in the Crown, to treat with the Indians, and

this they did independently of the government of the United States. This was notably true of the State of New York. Laws were enacted from time to time by the Legislature of the state authorizing treaties with the Indians. In all, more than 30 treaties were made by the state and various tribes, independently and without the investigation of the government of the United States. (Collection of State Treaties, Assembly Document 1889 Report on Indian Problems.)

These treaties were generally negotiated by a Commissioner appointed by the Legislature acting in conjunction with the governor of the state. It appears that on two or three occasions a Commissioner of the United States was present when treaties were made but in all cases the state and not the United States was the contracting party with the Indians. The treaties were in no sense treaties made by the President and Senate of the United States. Indeed, with reference to the extent of the participation of the United States, in a conveyance of August 31, 1826, which dealt with the Allegany and Cattaraugus reservations, the same was submitted to the Senate, although it was deemed a useless ceremony, the President approving it only, the Senate saying on receiving the communication from the President that the matter had been referred to the Committee on Indian affairs and afterwards on it having been reported back to the Senate, that body refused to ratify it, passing an explanatory resolution as follows:— "Resolved that by the refusal of the Senate to ratify the treaty with the Seneca Indians it is not intended to express any disapprobation of the terms of the contract entered into by the individuals who are parties to that contract, but merely to disclaim any power over the subject matter."

The particular construction given by the State of New York to the Federal Constitution as shown by the numerous

treaties made by it with the Indian tribes and the recognition by the Federal authorities of their validity is very strong evidence that the clause in the Federal Constitution prohibiting the states from entering into treaties does not preclude a state having the preemptive right to Indian lands from dealing with the Indian tribes directly for the extinguishment of the Indian title. Such a dealing is not a treaty in the constitutional sense and is not inconsistent with the exercise of the United States of its general jurisdiction in the protection of the Indians in their right of occupation in their lands.

The remark of Justice McLean in his opinion in Worchester vs. State of Georgia (6 Peters 580) that "under the constitution no state can enter into any treaty, and it is believed that since its adoption no state under its own authority has held a treaty with the Indians" was true as referring to treaties for lands owned by the general government, but if intended to have a broader scope, seems opposed to the facts of history. The United States by virtue of the cession made by the states was the owner of a large territory in possession of the Indian tribes with the exclusive right of preemption.

Subsequent to the cession by the states to the United States of these western lands, the State of New York and the other states of the thirteen original ones were at the same time owners of lands in the occupancy of the Indian tribes within their respective limits and had the exclusive power to extinguish the Indian title thereto. The United States could not impair the title of the states nor purchase the lands nor authorize any purchase without the consent of the state within which they were situated.

Having no original right of sovereignty, the United States at no time without the consent of a state could through their commissioner or representative present at the making of any treaty or compact reserve to themselves the right of sovereignty, government or jurisdiction, since there existed in the United States no inherent power other than that granted by the Third clause of Section 8 of Title 1 of the Federal Constitution which provided for the regulation of commerce among the several states and with the Indian tribes.

The inherent right of sovereignty, jurisdiction and government over the lands upon which the Allegany reservation is situate, lay in Massachusetts and New York and that right, although in controversy between these two states, was adjusted by the cession of the right of sovereignty, government and jurisdiction to New York by Massachusetts which cession was fully approved by the Congress acting under the Articles of Confederation and subsequently by the United States under the constitution. There is no indication in the records that New York has ever yielded these rights of sovereignty and government. The United States never having had a preemptive right to any of the lands in question in western New York could not set aside any of these lands for the Seneca Indians; nor did the United States ever set such lands aside for the Seneca Indians, for the lands were reserved by the Seneca Indians to their own use in the agreement entered into by the Seneca Nation and Robert Morris in the presence of and with the approval by the United States Commissioner, Jeremiah Wadsworth, the said Commissioner reserving no rights to the United States at the time.

POINT TWO.

New York having exercised her sovereign power within the Seneca Reservation, with the acquiescence of the Indians and the Federal government, jurisdiction of the United States over lands of the Seneca Indians is not exclusive.

The application for a Writ of Habeas Corpus in the instant case alleges that the crime for which the defendant was indicted and convicted is one of the crimes covered by Section 452 of Chapter 11, Title 18 of the United States Code; that it is also under Subdivision 3, Section 451 of the same Title and Chapter of the United States Code.

Section 452 deals with murder in the first and second degree and under the annotations to that section it is indicated that a felony murder would fall under the provisions of this Section.

Subdivision 3 of Section 451 provides that the crimes and offenses defined in Chapter 11, Title 18 of the United States Code "shall be punished as herein prescribed when committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dock yard, or other needful building."

It is possible that the Federal courts have and will take jurisdiction for the prosecution of crimes on Indian reservations in three different ways.

First, under the provisions of Section 548, Chapter 15 of Title 18 of the United States Code, an Indian committing any one of the seven enumerated major crimes "on the person or property of another Indian or other person within the boundaries of any state of the United States or within the limits of any Indian reservation shall be tried * * * as are all other persons committing said crimes within the exclusive jurisdiction of the United States."

That the state of New York does not have jurisdiction of an Indian living in the tribal relation who has committed one of these major crimes within the boundaries of his tribal reservation is settled law in New York. People *ex rel,* Cusick vs. Daley, 212 N. Y. 183. If the facts of any case bring the prosecution thereof within the provisions of the aforementioned Section 548 admittedly the Federal government has exclusive jurisdiction. In the instant case neither the defendant nor decedent was an Indian so further consideration of Federal jurisdiction by virtue of this Section is not necessary.

Second, Section 217, Chapter 6, Title 25 United States Code provides that the general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States except the District of Columbia, shall extend to the Indian country. There is a further exception relating to crimes, the punishment of which is expressly provided for in this title. It is submitted that at no time has the Allegany reservation, located in western New York even been Indian country and this contention is supported by the history of the acquisition of these lands and the reservation of certain areas for the use of the Indian tribes. Furthermore, the Benson case, Benson vs. U. S., 44 Fed. 178, which was prosecuted under this

very section, decided that the city of Salamanca did not lie in Indian country and that the Courts of the state of New York and the laws that were therein enforced, had jurisdiction over and application to the liquor traffic as regulated by New York laws within the city of Salamanca located on the Allegany reservation although there was a violation of a Federal provision if the crime occurred in Indian country.

The term "Indian Country" embraces all lands within the limits of the United States to which the Indian title has never been extinguished, except that which lies within the exterior geographical limits of a state, and which was not excepted from the jurisdiction of that state at the time of its admission into the union (*Ex parte* Kan-gi-Shunca, 109 U. S. 556).

Third, Section 451 and 452, of Chapter 11, Title 18 of the United States Code under which the application for a writ is made, deals with areas over which the United States has exclusive jurisdiction. The historical background of these areas in which the city of Salamanca lies indicates that the United States has never exercised exclusive jurisdiction over that portion of the Allegany Indian reservation which lies within the limits of the city of Salamanca. The Benson case indicates that the Federal government does not have the power to exercise jurisdiction because this was not Indian country, and it was conceded that New York would have the power and should exercise jurisdiction and the control of the liquor traffic in what was then the village of Salamanca.

It was conceded that New York would have the power and should exercise jurisdiction over the reservation inhabited by the Seneca Nation in the case of New York vs.

Dibble, 21 Howard 366. In the Dibble case, under the provision enacted by the New York State legislature to secure to the Indian inhabitants thereof their rightful occupancy of the Seneca reservations, a summary proceeding for the removal of certain white persons who had encroached within the Indian reservation under color and title purported to be obtained from the Ogden Land Company, which had and still probably held the preemptive rights to these lands, was instituted by a County Judge and a warrant issued to a Sheriff for the removal.

The white encroachers challenged the power of the County Judge to issue a warrant in a summary proceeding on the theory that they were deprived of a trial by jury and therefore of due process.

The actions of the County Judge were upheld in all the courts of New York state and the question was taken to the United States Supreme Court, where it was held that the State of New York had a right to exercise its sovereign powers within these Indian nations so far as it was necessary to protect the rights and property of Indians in this state and to preserve the public peace. It is noted that even at this date, in the late fifties of the last century, the Indians were directed to seek redress in the courts of New York State and not those of the Federal government when they were being wronged.

This was a logical conclusion since some ten years before the Seneca Nation, being the inhabitants of the Allegany and Cattaraugus reservations, had on December 4, 1848 adopted a new constitution and prayed the State of New York and the United States to approve the same and that constitution was subsequently approved by the two governments. The government of the United States and the

state of New York were asked "to aid us in providing laws under which life shall be possible."

Section 19 of that constitution provides: "The laws passed by the legislature of the state of New York for the protection and improvement of the Seneca Nation of Indians, and also all the laws and regulations heretofore adopted by the Chiefs and regular council assembled shall continue in full force and effect as heretofore except so far as they are inconsistent with the provisions of this constitution."

Section 4 provides: "The jurisdictional power shall be vested in three peacemakers on each reservation; any two of whom have power to hold courts, subject to an appeal to the council and *to such courts of the state of New York as the legislature thereof shall permit.*"

Under the provisions of this constitution the Indians have had access to the courts of the state of New York and have availed themselves of this access and New York state has exercised the jurisdiction over the internal affairs of the Indians living in the tribal relation upon these reservations.

Seneca Nation of Indians vs. Christie, 126 N. Y. 122.
Hatch vs. Luckman, 155 A. D. 765.
Jimeson vs. Pierce, 78 A. D. 9.
United States vs. Waldow, 294 Fed. 111.

In United States vs. Waldow (294 Fed. 111) one Pierce as relator, sought a writ of Habeas Corpus to discharge himself, an Indian, held under a state process. His imprisonment was the result of the following facts:

A Seneca Indian of full blood residing on the Cattaraugus reservation, named Patterson, died possessed of house and lands situate on that reservation. His widow was a white woman and he left a Last Will and Testament naming her executrix, which Will was admitted to probate in the Erie County Surrogate's Court and thereupon the Seneca Indian, named Pierce, began suit in the Peacemakers court in the Cattaraugus County Indian Reservation, alleging that Patterson's widow and children were not members of the Seneca Nation and so not entitled to inherit the real estate of the deceased and Pierce obtained Letters of Administration under the tribal customs.

The widow appeared in the Peacemakers court and objected to its jurisdiction but that court declared that the lands be surrendered to Pierce and the widow vacate. Upon application of the widow the Supreme Court of New York granted an alternative writ of prohibition by which the Peacemakers' court was required to show cause why the writ should not be made absolute. The Peacemakers requested a continuance and upon the return date defaulted and the writ was duly issued.

Thereafter, upon showing that the Peacemakers court disobeyed the writ, the reservation marshal who under his authority threatened to carry out the decree of dispossession, and Pierce, one of the claimants, were held in contempt and committed to Erie County Jail. In execution of the commitment, the Sheriff of Erie County arrested both the Reservation Marshal and Pierce while they were temporarily in the Federal Building at Buffalo invoking, as wards of the Nation, the aid and protection of the United States Attorney. Under their apprehension they immediately applied to the District Court of the Western District of New York for a writ of Habeas Corpus. The writ

was dismissed upon the merits, on the grounds that the State of New York has authority to enact laws for the protection of the civil rights as to the internal affairs of the Indian residents on the Cattaraugus and Allegany reservations, which authority it has exercised with the acquiescence of the Indians and the Federal government since 1849.

It is apparent then that within the boundaries of the Cattaraugus and Allegany reservations New York has exercised jurisdiction of its courts in many instances with the consent of the Indians and without the interference of the Federal courts. In the absence of congressional legislation a Federal court will not interfere with the administration of such laws by the courts of the state. Even in western states carved from United States territory where attempts were made to invoke federal jurisdiction under the same statutory provisions as are sought in the instant case, that is, that the Federal government should assume jurisdiction because the territory was within the exclusive jurisdiction of the United States, it has been held that federal jurisdiction did not lie, for it was said that the state, by its admission into the union by Congress, *upon an equal footing with the original states* in all respects whatsoever, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits including the reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.

United States vs. McBratney, 104 U. S. 621.

It is to be noted that in this case that the United States once held and exercised exclusive jurisdiction over the territory in question but was divested of such jurisdiction when the state was admitted to the Union *upon an equal footing with the original states in all respects whatsoever.*

The McBratney case was cited in the case of Draper vs. United States, 164 U. S. 640 in which case Draper, who had been convicted in Federal Court of the crime of murder alleged to have been committed on the Crow Indian reservation in the state of Montana, contended that the Federal Courts had no jurisdiction which contention was supported by the United States Supreme Court.

Assuming that there never had been enacted a Statute of 1875 (18 Stat. 330) and the Amendments of 1890 (29 Stat. 558) providing for the village, now the city of Salamanca, and the several incorporated villages such as Vandalia, Carrollton and Red House on the Allegany Reservation, and assuming further that Section 71 of the New York Indian Laws had never been passed in furtherance of the Statute of 1875, since the United States has never exercised or purported to reserve to itself the power to exercise exclusive jurisdiction over either of these two reservations, and since by the very terms of the section under which this allegation is made, exclusive jurisdiction is necessary to bring the matter to a federal court, this third instance under which federal jurisdiction might attach fails of qualification in the instant case.

The contention that the provisions of Section 71 of the Indian Law, Consolidated Laws of New York, are unconstitutional when they are sanctioned by the Federal government after being requested by the Indians is without weight. Neither the Seneca Indians nor the United States has challenged the jurisdiction of the Salamanca City Court (New York Session Laws of 1913, page 507) to punish *Indians* for petty crimes committed within the corporate limits of the city of Salamanca and if applicant's premise that Section 451 of Chapter 11 of Title 18 of the United States Code is true regarding federal jurisdiction of murder in

Salamanca, the corollary, that the provisions of Section 468 of the same Chapter and title should bring the petty crimes within the same federal jurisdiction must follow. The federal authorities have never interested themselves in the prosecution of either white man or Indian for petty crimes committed in Salamanca, prosecuted by its city court and punished by imprisonment in the Cattaraugus County Jail. Exclusive jurisdiction of the United States has never attached to the lands within the Allegany reservation and particularly that portion lying within the city of Salamanca.

The Forness case (U. S. vs. Forness, 125 Fed. 2nd, 928), cited by the appellant as his principal authority, was based on the false assumption that the Allegany Reservation comprised "lands granted by the United States to the Indians." As has been shown, the land in the City of Salamanca was never claimed or owned by the United States. The title to this land was in the colonies of Massachusetts and New York before the Constitution was adopted and has been in the States of Massachusetts and New York and their grantees ever since that time.

POINT THREE.

The writ of habeas corpus cannot be made use of as a writ of error.

The affidavit of counsel in support of the application for the writ of habeas corpus states "that an investigation of the record of the case reveals that at no time was the jurisdiction of the Supreme Court of the state of New York challenged in any of the proceedings of the Supreme Court of the State of New York" (R. 6).

A state court of original jurisdiction which has the parties before it may enforce and protect rights secured by the constitution and the laws in pursuance thereof.

U. S. vs. Waldow, 294 Fed. 111.
Robb vs. Connelly, 111 U. S. 637.
Ex Parte Royall, 117 U. S. 248.
Eaton vs. West Virginia, 91 Fed. 760.

POINT FOUR.

The decision of the County Judge should be affirmed.

Respectfully submitted,

CHARLES E. CONGDON,
Assistant District Attorney for the County of Cattaraugus,
Salamanca, N. Y.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 11 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. DONALD A. J. RAY,
Petitioner-Appellant,

vs.

WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York,
Appellee.

BRIEF FOR THE WARDEN AND THE STATE OF NEW YORK.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State of New York,
Attorney for Appellee.

ORRIN G. JUDD,
Solicitor General,
HENRY S. MANLEY,
Assistant Attorney-General,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS
BATAVIA, N. Y.

INDEX

	PAGE
Question	1
How it arises	2
Quaere, whether the question previously stated can be raised by habeas corpus	3
The State jurisdiction is not doubtful	5
Summary of argument	6–7
Point I. Indian Law § 71, insofar as it provides that "all the general laws of the state" extend over and apply to Salamanca, is not inconsistent with the Constitution of the United States, particularly Article I, Section 8, Clause 3, or with any treaty entered into or laws enacted thereunder	8
A. Historical Background	8
B. Argument of Specific Points	32
(1) There is no inconsistency between the State jurisdiction asserted and the seventh article of the Treaty of Canandaigua	32
(2) Indian Law § 71 is constitutional even without express authorization by Congress	32
(3) However, Indian Law § 71 is authorized by Congress in the 1875 Act	34
(4) The Forness decision does not hold to the contrary	34
(5) Salamanca is not "Indian country" and hence 25 U. S. C. § 217 does not render 18 U. S. C. §§ 451 and 452 applicable	36
Appendix: Digest of all decisions by the Supreme Court of the United States and the Circuit Court of Appeals, Second Circuit, relative to the New York Indians, to November 30, 1945	45

TABLE OF CASES.

	PAGE
Adams v. United States, 319 U. S. 312	37
Bates v. Clark, 95 U. S. 204	39, 40, 41, 42
Benson v. United States, 44 F. 178	4, 5, 39
Cherokee Tobacco, 11 Wall. 616	35
Clairmont v. United States, 225 U. S. 551	42
Davis v. Johnston, 144 F. 2d 862; cert. den. 323 U. S. 789, 819	4
Donnelly v. United States, 228 U. S. 243	38, 42
Draper v. United States, 164 U. S. 240	5, 42
Ex parte Crow Dog, 109 U. S. 556	38, 39, 42
Ex parte Ray, 54 F. Supp. 218	2
Goodell v. Jackson, 20 Johns. Rep. 694	15
Hanley v. Kansas City, 187 U. S. 617	33
Hatch v. Luckman, 64 Misc. 508	15
Holden v. Joy, 17 Wall. 211	35
James v. Dravo Contracting Co., 302 U. S. 134	37
Matter of Morhous v. N. Y. Sup. Ct., 293 N. Y. 131	4
New York ex rel. Cutler v. Dibble, 21 How. 366	17, 35
New York Indians, 5 Wall. 761	39
People ex rel. Carr v. Martin, 286 N. Y. 27	3
People ex rel. Cusick v. Daly; 212 N. Y. 183	4, 33, 38
People ex rel. Erie R. R. Co. v Beardsley, 41 N Y. 619.	24
People ex rel. Kennedy v. Becker, 241 U. S. 556	12
People ex rel. Ray v. Martin, 181 Misc. 925; aff'd 268 App. Div. 218; aff'd 294 N. Y. 61	3
Pickett v. United States, 216 U. S. 456	42
Rice v. Olson, 89 L. ed. 903	4
Surplus Trading Co. v. Cook, 281 U. S. 647	33, 37
The Scotia, 14 Wall. 170	35
United States v. Bailey, 1 McLean 234	4, 17, 33
United States v. Forness, 125 F. 2d 928; cert. den. 316 U. S. 694	2, 3, 34

PAGE

United States v. Holliday, 70 U. S. 407 33
United States v. Kagama, 118 U. S. 375 38
United States ex rel. Kennedy v. Tyler, 269 U. S. 13..23, 35
United States v. Le Bris, 121 U. S. 278..... 42
United States v. 43 Gallons, 93 U. S. 188 35
United States v. Rogers, 4 How. 567 33
United States v. McBratney, 104 U. S. 621 .....5, 42
United States v. McGowan, 302 U. S. 535 33
United States v. National Gypsum Co., 141 F. 2d 859 .. 19
United States ex rel. Ray v. Martin, 141 F. 2d 300..... 2, 3
Worcester v. Georgia, 6 Peters 515 .....9, 11, 16

TABLES OF STATUTES

Constitution of the United States, Art. I § 8 Cl. 3..... 1, 7
Constitution of State of New York, 1846, Art. I § 14.. 31
18 U. S. C. §§ 451, 452.....4, 36
18 U. S. C. § 548.....4, 38, 43
25 U. S. C. § 217.....4, 36, 37, 41, 43
25 U. S. C. § 241..... 39
Indian non-intercourse acts 11, 13, 37
18 Stat. 330 (1875 Act) 2, 30, 31, 34, 35, 37, 43
26 Stat. 558 31
N. Y. Indian Law § 71 (L. 1881 c. 188) 1, 6, 30, 32, 33, 43
N. Y. Penal Law §§ 1044, 1045-a..... 2
N. Y. Session Laws:
L. 1803 c. 31..... 14
L. 1813 c. 91..... 17
L. 1821 c. 204..... 18
L. 1822 c. 204..... 15
L. 1836 c. 316..... 24
L. 1845 c. 150..... 19
L. 1847 c. 365..... 19
L. 1847 c. 466..... 26
L. 1849 c. 378..... 20
L. 1860 c. 439, 481 19

PAGE

L. 1861 c. 283 19
L. 1866 c. 30, 263, 472 26
L. 1871 p. 2179 27
L. 1914 c. 508 21
L. 1915 c. 561 21

TABLE OF MISCELLANEOUS REFERENCES.

H. R. 227, 21st Cong. 1st Sess. 15
H. R. 474, 23rd Cong. 1st Sess. 40
H. R. 478, 43rd Cong. 1st Sess. 29
H. Misc. Doc. 75, 43rd Cong. 2d Sess. 29
S. Rep. 1680, 51st Cong. 1st Sess. 31
S. Docs. 145, 190, 55th Cong. 2d Sess. 31
H. Doc. 1590, 63rd Cong. 3rd Sess. 22
Hearings on H. R. 9720, 71st Cong. 2d Sess. 22
S. Doc. 87, 72d Cong. 1st Sess. 31, 35
Congressional Globe, 1872-1875 ..... 27, 29, 30
Bd. of Indian Comrs., annual report 1874, 1875 27
" " " 1924 33
Commissioner Ind. Af., " 1850 20
" " 1864 20
" " 1872 27
" " 1874 ..... 21, 28
" " 1889 21
" " 1892 ..... 21, 31
" " 1897 21
" " 1898 21
Treaty of Fort Stanwix 1784 8
" Fort Harmar 1789 13
" Canandaigua 1794 ..... 11, 13, 32
" Big Tree 1797 ..... 12, 13
" Buffalo Creek 1838 19
" " 1842 19
" Tonawanda 1857 19

PAGE

Indian Treaties (Washington, 1826, 1837) 9
National Archives, Indian Office letterbooks and papers received 14, 16, 19, 20, 24, 25, 27, 29
II Messages of Presidents 522, 539 15
II " " Governors (N. Y.) 1119 15
V " " 199 19
Am. State Papers, Ind. Af. 14
Bingham, Cradle of the Queen City (Bflo. 1931) 14
56 Decisions Dept. of Int. 39 5
Elliot's Debates 10
Hartford Compromise 1786 9
Hoebel, Iroquois Law and Order (1945) 33
Hough, Proceedings Comrs. Ind. Af. (Albany 1861) .. 9
Indian Land Cessions in U. S. (Washington 1899) 9
Jefferson Mss. Library of Congress 14
III Kent's Commentaries, 383 15
Madison, James, Writings (N. Y. 1900) 9
Manley, Treaty of Ft. Stanwix (Rome 1932) 8, 9
Monroe, James, Writings (N. Y. 1898) 9
Op. Atty. Gen. (unreported, Mar. 26, 1819) 12
Cuthbert W. Pound, 22 Col. L. Rev. 97 6
Stone, Red Jacket (Albany 1866) 14, 16
N. Y. Assembly Mss., N. Y. S. Library 14, 18
N. Y. Assembly Doc. 168 of 1836 24
N. Y. Senate Docs. 93, 94, 104 of 1845 19
N. Y. Assembly Doc. 207 of 1847 26
N. Y. Senate Doc. 108 of 1850 19
N. Y. Assembly Doc. 108 of 1859 26
N. Y. Assembly Doc. 28 of 1860 19
N. Y. Assembly Doc. 30 of 1875 29
N. Y. Assembly Doc. 51 of 1889 19

Supreme Court of the United States

OCTOBER TERM, 1945

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel.
DONALD A. J. RAY,
Petitioner-Appellant,

vs.

WALTER B. MARTIN, as Warden of Attica State Prison,
Attica, New York,
Appellee.

BRIEF FOR THE WARDEN AND THE STATE OF NEW YORK.

Question.

The ultimate question presented is whether the penal laws of the State of New York apply to a non-Indian charged with the murder of another non-Indian within the confines of the City of Salamanca, or whether such a crime is solely within the purview of federal law. More specifically, the question is whether N. Y. Indian Law § 71, as enacted by L. 1881 c. 188, which provides that "all the general laws of the State" extend over and apply to Salamanca,* is void under any provision of the Constitution of the United States, particularly Article 1, Section 8, Clause 3.

* The most relevant portion of this statute is Appendix H to petitioner's brief, p. 40.

How it arises.

Obviously such a question arises only because of certain peculiarities in the history and organization of the City of Salamanca. This City is within the boundaries of the Allegany Reservation, which until a hundred years ago was completely, and is now for its greater part, a reservation of the Seneca tribe of Indians. The City is differentiated from other parts of the reservation by having passed into white possession, and de facto into white control, under certain long-term leases authorized by an Act of Congress of 1875 (18 Stat. 330).

The petitioner, Ray, is confined to Attica State Prison for life, having been sentenced following conviction in a State court for felony murder, as provided in N. Y. Penal Law §§ 1044, 1045a.* No denial of State jurisdiction was suggested at the trial or upon the appeals which followed (R. 6 par. 18; R. 43-44).

In March 1943 the present question was raised for the first time, in a habeas corpus proceeding, based on some extreme statements as to the federal jurisdiction over Salamanca to be found in *United States* v. *Forness*, 125 F. 2d 928 (cert. den., 316 U. S. 694).

The proceeding having been initiated in a federal court, District Judge John Knight decided against the petitioner on the merits and also on the ground that the question should first be presented to the State courts. *Ex parte Ray*, 54 F. Supp. 218; R. 7-12. The Circuit Court of Appeals, Second Circuit, affirmed. *United States ex rel. Ray* v. *Martin*, 141 F. 2d 300; R. 12-13. The principal opinion was by Judge Frank, who also wrote the opinion in the *Forness* case, and was upon the narrow ground that "the application for the writ to a federal court was prematurely made."

* Printed as Appendix I to petitioners brief, p. 43.

Judge Swan, who concurred in that opinion, had not participated in the *Forness* decision. Judge Clark, who like Judge Frank sat in both cases, expiated his having acquiesced in the luxuriant dicta of the earlier case by a separate memorandum in the *Ray* case to the effect that he agreed with the District Judge upon the merits as well as the procedural question.

A new petition for habeas corpus having been filed in the State courts, the decisions have uniformly been adverse to the petitioner upon the merits. *People ex rel. Ray* v. *Martin*, 181 Misc. 925, R. 20-33; aff'd 268 App. Div. 218, R. 36-39; aff'd 294 N. Y. 61, R. 43-55.*

Quaere, whether the question previously stated can be raised by habeas corpus.

The Court of Appeals responded to this doubt by citing *People ex rel. Carr* v. *Martin*, 286 N. Y. 27, 31, 32 (R. 44, top of page). The reference obviously to dictum in that opinion, because the decision 'self is opposed to the use of habeas corpus to present belated defense. That indictment alleged that Carr stole certain rings "owned by Rose Davin." He pleaded guilty and was sentenced, but subsequently in a habeas corpus proceeding he challenged the jurisdiction of the sentencing court, upon the ground that Rose Davin was his wife and he could not be guilty of larceny from her. The Court of Appeals, after stating the general rule that a plea of guilty is an admission of the allegations contained in the indictment, observed that Carr's defense could have been raised under a plea of not guilty, and that the People certainly did not have the bur-

* The opinion of the Court of Appeals as printed in the present record contains numerous errors eliminated in the official report, for which reason a certified copy of the corrected opinion has been filed with the Clerk of the Court.

den of alleging or proving that Rose Davin was *not* Carr's wife. It was decided that the defense could not be raised by habeas corpus.

A trial and verdict of guilty has the same conclusive effect as a plea of guilty. An interesting recent case illustrating this point, and in some respects the converse of the present one, is *Davis* v. *Johnston*, 144 F. 2d 862 (9th Cir., 1944; cert. den., 323 U. S. 789, 819). Davis was indicted in a federal court for a murder alleged to have been committed in the "Indian country", specifically the Rosebud Indian Reservation in South Dakota.* After conviction and sentence to Alcatraz for life, he presented in a habeas corpus proceeding the point that the premises which were the scene of the murder were allotted and hence had ceased to be reservation. The decision was against him, on the ground that the jurisdictional defense was one he could have raised under his plea of not guilty to the allegations of the indictment.

Rice v. *Olson*, 89 L. ed. 903 (Apr. 23, 1945; apparently not officially reported) will indicate why no more definite position is taken against the present petition in its procedural aspects. See also, *Matter of Morhous v. N. Y. Supreme Court*, 293 N. Y. 131.

---

* Murders committed on Indian reservations within state boundaries fall into the exclusive jurisdiction of federal courts in two classes of cases: (a) Under 18 U. S. C. § 548, when committed by an Indian, which is illustrated by *People ex rel. Cusick* v. *Daly*, 212 N. Y. 183, but certainly is not the present case. (b) Under 18 U. S. C. §§ 451 and 452 and 25 U. S. C. § 217, when committed in the "Indian country," subject to certain exceptions and doubts (cf. *United States* v. *Bailey*, 1 McLean 234). The *Davis* case was of the second class, and petitioner says such is the present case. This brief contends, as a first answer to that proposition, that Salamanca is not "Indian country," relying upon *Benson* v. *United States*, 44 Fed. 178, and other authorities noted hereinafter.

The State jurisdiction is not doubtful

No inference of weakness in the State's position should be drawn from the length of its brief. The State could readily defend all the ground needed for mere decision, upon the relatively narrow doctrine stated in an opinion of the Solicitor of the Interior Department dated December 11, 1936 (56 Decisions of Dept. of Int. 39) as follows:

> "It is also well settled that a State may punish a non-Indian for an offense committed against another non-Indian within an Indian reservation, unless the United States in establishing the State itself has reserved absolute and exclusive jurisdiction over the territory of the reservation. *Draper* v. *United States*, 164 U. S. 240; *United States* v. *McBratney*, 104 U. S. 621.
>
> "The theory underlying all the foregoing decisions appears to be that control over Indian conduct and Indian property on an Indian reservation is reserved to the United States, while for all other purposes the State may exercise a police jurisdiction over the territory of the reservation."

Citing the same two cases, the United States Attorney appeared before District Judge Knight in the present case and conceded the State's jurisdiction over Salamanca (R. 11). The opinions of Judge Knight and Circuit Judge Clark herein, as well as the State courts, uphold the jurisdiction. The decision of the Circuit Court in 1890 in the case of *Benson* v. *United States*, 44 Fed. 178, is squarely opposed to the petitioner's arguments. Acceptance of them now would involve a substantial revision of history (R. 18-19).

It is, however, important to the interests of the City of Salamanca and to the State to have the jurisdiction upheld on broader and truer grounds; not a narrow ground equally applicable to western reservations which will merely encourage more litigation as to Salamanca and cast

doubt over all its institutions; but one based upon its peculiar history and unique organization. For that reason this brief will devote more than half its pages to a statement of historical background, and will append a digest of all the decisions of this Court and of the Circuit Court of Appeals relative to the New York Indians. We do this because we are conscious of the truth of the observation made by Judge Cuthbert W. Pound in 1922 concerning the body of law dealing with jurisdiction over the New York Indians (22 Col. L. Rev. 97-102):

> "The present confusion and uncertainty discredits the lawsuit between individuals as a means of deciding great questions of state and national jurisdiction."

The *Forness* decision of the Circuit Court of Appeals, which inspired this litigation, seems to us a notable contribution to that confusion and uncertainty. Accordingly, at the risk of being wearisome, we shall trace the devolution of lands in western New York, showing how Salamanca attained its unique character of a white man's city in the midst of an Indian reservation; and likewise we shall trace the development of the peculiar body of law applicable to the Indians of New York, attempting to show why authorities concerning the southern and western Indians are merely confusing; all of which probably goes beyond the needs of the present brief, but is not completely irrelevant to it. More directly relevant will be the argument that no federal act forbids the jurisdiction to the State courts or confers it upon federal courts; and that "all the general laws of the State" do indeed extend to Salamanca.

Summary of Argument.

Point I. Indian Law § 71, insofar as it provides that "all the general laws of the state" extend over and apply to Salamanca, is not inconsistent with the Constitution of

the United States, particularly Article I, Section 8, Clause 3, or with any treaty entered into or laws enacted thereunder.

A. Historical Background (pages 8-32).

(a) Jurisdiction over Indian affairs under the Articles of Confederation (pages 8-9).

(b) Drafting of Indian provision in the Constitutional Convention of 1787 (pages 10-11).

(c) Treaty of Canandaigua in 1794 (pages 12-13).

(d) Development of criminal jurisdiction by New York State over the Seneca Indians and indications of approval by Congress, the executive departments of the United States and this Court, in the period 1794-1929 (pages 14-23).

(e) How parts of the Allegany Reservation, particularly Salamanca, became predominantly communities of non-Indians in the period 1836-1942, including enactment of the Act of Congress of 1875 and the New York statute of 1881 (pages 24-31).

B. Argument of Specific Points (pages 32-43).

(1) There is no inconsistency between the State jurisdiction asserted and the seventh article of the Treaty of Canandaigua (page 32).

(2) Indian Law § 71 is constitutional even without express authorization by Congress (pages 32-33).

(3) However, Indian Law § 71 was authorized by Congress in the 1875 Act (page 34).

(4) The Forness decision does not hold to the contary (pages 34-36).

(5) Salamanca is not "Indian country" and hence 25 U. S. C. § 217 does not render 18 U. S. C. §§451 and 452 applicable (pages 36-43).

POINT I.

Indian Law § 71, insofar as it provides that "all the general laws of the state" extend over and apply to Salamanca, is not inconsistent with the Constitution of the United States, particularly Article I, Section 8, Clause 3, or with any treaty entered into or laws enacted thereunder.

Historical Background.

Similarly to the condition before the Revolution, when it had never been settled definitely whether the Iroquois were sovereign allies of the Crown or were dependent upon the colonial government,* so the Articles of Confederation indicated an indefinitely divided control over Indian affairs. Congress was given, "the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians", but the clarity of that grant of power was then obscured by two ambiguous provisos: It was limited to Indians who were "not members of any of the States", and was further limited and obscured by the language, "provided that the legislative right of any State within its own limits be not infringed or violated."

An exchange of letters between James Monroe and James Madison immediately after the Treaty of Fort Stanwix in 1784 has preserved their interpretation of the Articles of Confederation, confirmed by other documents

---

* "The colonists of New York asserted the Iroquois dependency upon that province, and could point to many recognitions of it. Until the ascendancy of Sir William Johnson the Board of Indian Commissioners at Albany controlled all dealings with the Indians of that province. Probably it was to put his dealings with the Indians outside the meddling of the provincial government, as well as to flatter the Indians, that Johnson, deriving his authority from the Crown, recognized their sovereignty, notwithstanding that the attorney general insisted upon their dependency." Manley, *The Treaty of Fort Stanwix* (Rome 1932), p. 23.

of the period, that the Articles saved to the State of New York at least the right to acquire lands from the Indians within its borders.* The same interpretation was implicit in the Hartford Compromise of 1786, by which Massachusetts and New York settled their conflicting claims upon western New York by drawing a north-and-south line approximately through Geneva, still known as the "Preemption Line", because Massachusetts was awarded the "preemption rights" to all land lying west of that line, New York being assured such rights to the east, and also "the government, sovereignity and jurisdiction" of all the lands involved. The Hartford Compact was approved by Congress.

In the years 1785 to 1790 and even thereafter New York held treaty after treaty by which it purchased the other element of title, the so-called "Indian title" or possessory right, to nearly all the land in the State between the Geneva line and the Rome line. The United States was, of course, informed of those transactions, but did not participate in them.†

In the same period there was being drafted and adopted the Constitution of the United States. Assuming that its interpretation as to Indian affairs was decided by Chief Justice Marshall's opinion in *Worcester* v. *Georgia*, 6 Peters 515 (1832) beyond the possibility of any present enlightenment, nevertheless attention to the various phrases

---

* Vol. I, *Writings of James Monroe* (N. Y. 1898) p. 46:
Vol. II, *Writings of James Madison* (N. Y. 1900) p. 91.
These and other documents are quoted in Manley, *The Treaty of Fort Stanwix*, pp. 108-111.

† Hough, *Proceedings of the Commissioners of Indian Affairs*, (Albany 1861) is a publication of the official report of the earlier treaties. The principal ones are summarized, as "contracts," in the volumes of *Indian Treaties* published at Washington in 1826 and 1837, at pp. 17-25 in the former, and pp. 40-48 in the latter. See also *Indian Land Cessions in the United States* (Washington 1899).

proposed in the constitutional convention of 1787 will aid to an understanding of the viewpoints of the period.

On August 18, 1787, Madison introduced in the convention a proposition to give various powers to Congress, among them:

> "To regulate affairs with the Indians, as well within as without the limits of the United States." (5 Elliot's Debates, 439.)

Undoubtedly that language was designed to take to Congress the jurisdiction which New York State had theretofore maintained and been exercising. On August 22 the committee to which the matter had been referred reported that the power should be given:

> "to regulate commerce * * * with the Indians within the limits of any state, not subject to the laws thereof." (5 Elliot's Debates, 462.)

Probably that qualified language was to relieve apprehension of New England states which for many years had extended their laws over Indians within their bounds, but it was expected to restrain New York State under the conditions then existing. Neither of those provisions was adopted. What was adopted was another form of words, presumably meaning something different, and apparently meaning something less:

> "The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

That language was agreed upon without debate on September 4, and on September 17 the articles were signed in final form.

The proceedings of the convention remained secret until 1819, and until 1837, when Congress paid $30,000 to

Madison's widow to acquire his manuscripts of the debates, few persons saw them. Chief Justice Marshall in deciding *Worcester* v. *Georgia* in 1832 seems to have been unaware of the history of the Indian provision in the convention, and was content at page 558 to say dogmatically that the provision in the Articles of Confederation was "ambiguous", but that the powers of war and peace and making treaties and regulating commerce conferred under the Constitution, "comprehend all that is required for the regulation of our intercourse with the Indians. * * * The shackles imposed on this power, in the confederation, are discarded."

But he also recognized, at page 557, a circumstance wherein the present New York reservations differ greatly from even the Georgia reservations of more than a century ago, that:

> "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."

It is indeed probable that the gentlemen adopting in 1787 the constitutional language about "Commerce with foreign nations, and among the several States, and with the Indian Tribes", thought of the Indian Tribes in a geographical sense, just as "The Indian Country" was referred to and described in the Indian non-intercourse acts passed by Congress in 1790, 1793, 1799, 1802 and 1834 (1 Stat. 137, 329, 743; 2 Stat. 139; 4 Stat. 729) and was shown apart from the states on maps of that day and for many years thereafter.

The Treaty of Canandaigua in 1794 is appended to the petitioner's brief, pages 32-35, and is much relied upon by it. Essentially it was a treaty of peace between the United States and the Six Nations, following immediately

after General Wayne's victory at Fallen Timbers. It also described the Indian lands in such manner as to release from any claim by the United States some lands inadvertently ceded to it at Fort Stanwix. It further provided that the Indian lands "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." The language last quoted meant those having rights of preemption, notably Messrs. Phelps and Gorham and Morris and others who had succeeded to the rights of Massachusetts, and including the State of New York. When the treaty meant the United States as an entity it said merely "the United States".*

The Allegany Reservation, from which the present legal issue arises, as well as the other Seneca reservations in western New York, first attained separate existence in the Treaty of Big Tree or Geneseo, held in 1797 between Robert Morris and the Seneca Nation, with Jeremiah Wadsworth presiding as a United States commissioner. Therein the reservation was merely described as a "piece or parcel of forty two square miles at or near the Allegany River."†

---

* There is much more evidence to the same effect, including the Treaty of Big Tree in 1797 to be mentioned below, and the language in the Treaty of Buffalo Creek in 1842 (Pet. br., bottom of p. 36). By an opinion of March 26, 1819, Attorney General William Wirt advised the Secretary of War as follows: "The legal titles of the States of New York and Massachusetts and of the grantees under them as settled and established by the Convention of 1786 are not divested or in any manner impaired by the treaty of Canandaigua, as to any of the lands then occupied by the Six Nations, nor are the preexisting rights of the Indians in any manner enlarged by that treaty." This opinion appears to be unpublished, but the original is among papers received by the Indian Office, in The National Archives. The Indian Office was in the War Department until 1849, when it was transferred to the newly formed Interior Department.

† The treaty is printed in 7 Stat. 601, also II Kapplers *Indian Laws and Treaties* 1027. The supplemental brief filed by the United States in *People ex rel. Kennedy* v. *Becker*, 241 U. S. 556, contains the Morris and Wadsworth notes on the negotiation of the Treaty in 1797.

Before tracing the history of the Allegany Reservation subsequent to the treaty of 1797, and showing how the then Indian village of Bucktooth subsequently became a junction point on the Erie Railroad and the village of Salamanca, recognized as white territory by an Act of Congress in 1875, and now the uniquely organized City of Salamanca, there is another topic to be stated. That is the development of criminal jurisdiction by the State of New York over the Seneca Indians, and the long record of approval by the United States.

The Treaty of Canandaigua in 1794 contained in its seventh article a provision, "that for injuries done by individuals on either side, no private revenge or retaliation shall take place", but complaint shall be made by the Six Nations to the President, etc. (Pet. br. pp. 34-35). The Court of Appeals has held, correctly, it is believed, that this was not a provision for ordinary criminal jurisdiction (R.46). The viewpoint as to that is illustrated by a treaty shortly before and by Indian non-intercourse acts shortly after. In the Treaty of Fort Harmar in 1789 between the United States and the Six Nations it was provided that Indians guilty of robbery, murder or horse stealing, committed "upon the citizens or subjects of the United States", should be delivered by the tribe to the nearest military post if the crime was committed within the territory of the United States, or to the civil authority of the state within which it happened (7 Stat. 33; II-Kappler 23). Similar provisions were in the Indian non-intercourse acts of 1790, 1793, 1799, 1802 and 1834. For instance, sections 14 and 19 of the 1802 act (2 Stat. 139) contained the provisions:

> "Nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian, having so offended."
>
> "Nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands sur-

rounded by citizens of the United States, and being within the ordinary jurisdiction of any of the individual states."

Two locally famous murder trials in the State courts were used by Red Jacket in vain attempts to establish the immunity of his people from the white men's laws. The first was that of Stiff-Armed George, at Canandaigua in 1802. The second was that of Tommy Jemmy, at Buffalo in 1821. Each murder was by an Indian upon the Buffalo Creek Reservation, the first victim being a white man and the second an Indian woman. Each resulted in conviction and a special act of pardon by the Legislature. The trial in 1802 was before Henry Brockholst Livingston, then a judge of the New York Supreme Court sitting at circuit. President Jefferson in official correspondence expressly approved the action taken, defended it before a Seneca delegation in Washington, and four years later appointed the judge to this Court.*

* The main facts of these two trials may be found in Stone, *Life and Times of Red Jacket* (Albany 1866) pp. 258-264, 383-387; also in Bingham, *The Cradle of the Queen City* (Bflo. Hist. Soc., 1931) pp. 178-179, 386-388. Letters of Aug. 14, 1802, from Secty. of War Henry Dearborn to Capt. Israel Chapin and Callender Irvine (the former recently removed as U. S. Indian Agent and the latter his successor) thank Chapin for having secured the murderer, and direct Irvine to go with Major Porter to the Senecas and urge them to keep the peace. National Archives, Indian Office letterbook A, page 264. At pages 312-315 is a speech by President Jefferson to a delegation from the Six Nations, assuring them that the courts of New York had jurisdiction to try the offense, but holding out the hope that grounds for pardon would be found. President Jefferson had already been in communication with Governor George Clinton about a pardon. Clinton's letter of Aug. 21, 1802, is in Am. State Papers, Ind. Af., Vol. I p. 667. Jefferson's letter of Sept. 6, 1802, to Dearborn is in the Jefferson mss., Library of Congress. In 40 Assembly mss., N. Y. S. Library, at pages 385 and 393 are a petition from the grand jurors of Ontario County and a speech by Red Jacket to the Governor, both interceding for the condemned. A letter of Feb. 14, 1803, from Dearborn to Gov. Clinton is at page 389; the Indian Office copy is in letterbook A page 319. Stiff-Armed George was pardoned by L. 1803 c. 31, on condition that he and the chiefs of the Seneca Nation give satisfactory assurances that he would immediately leave the State and not return.

Tommy Jemmy justified his murder of a old woman, committed upon the Buffalo Creek Reservation, upon the ground that she had been convicted in a tribal court of witchcraft, and he had officiated as executioner. This event aroused the Legislature, while pardoning the Indian executioner, to deny the jurisdiction of the tribal courts, and solemnly to assert:

> "That the sole and exclusive jurisdiction, of trying and punishing all and every person, of whatsoever nation or tribe, for crimes and offenses committed within any part of this state, except only crimes and offenses as are or may be cognizable in courts deriving jurisdiction under the constitution and laws of the United States, of right belong to, and is exclusively vested, in the courts of justice of this state, organized under the constitution and laws thereof." (L. 1822 c. 204.)

This statute seems to have had the approval of Chief Justice Ambrose Spencer and other judges, including Chancellor Kent.* The Committee on Indian Affairs of the House of Representatives, in a report dated February 24, 1830, considered the entire history of the matter and commented as follows upon the New York statute:

> "The law declaring the jurisdiction of that State has been enacted several years and the committee do not find that its validity has ever been seriously questioned." (21st Cong., 1st Sess., H. R. 227 p. 12. Serial Vol. 200.)

Similar views as to jurisdiction over the New York Indians were expressed by President Jackson in his second annual message, in 1830 (II Mess. Pres., 522), and in a message to the Senate dated February 22, 1831 (*Ibid.* 539).

* II Mess. Gov. 1119, 1120; *Goodell* v. *Jackson*, 20 Johns. Rep. 694, 716; III Kent's Comm., 383, note; and see also *Hatch* v. *Luckman*, 64 Misc. 508, 515-516.

Indictments of this period, now in the custody of the Erie County Historian, attest that these two murder trials were merely outstanding examples of a general criminal jurisdiction over the reservations then being administered by the State. It was in reference to this fact that a Seneca delegation, unpersuaded by Red Jacket's ideas of Indian sovereignty, on July 10, 1819, addressed a United States representative as follows:

> "You said we could not remain independent: we are sensible of this, and would undergo a gradual change: for instance, in case of crime now, we are not independent—we are punished. We foresee that we cannot remain independent."*

Worcester v. *Georgia* is usually remembered only for the opinion of Chief Justice Marshall and the controversy about the Cherokees. The concurring opinion by Mr. Justice McLean probably is a more reliable guide to viewpoints of the period. He seems to have been in a position of peculiar detachment from the Jackson-Marshall animosity, having been promoted from the Cabinet to this Court because of his differences with the President about his patronage policy. His opinion is as lengthy as that of the Chief Justice and shows more information upon the matters now under discussion. He said:

> "In some of the old states, Massachusetts, Connecticut, Rhode Island, and others, where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, have lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property." (p. 580.)

---

* National Archives, Indian Office papers received, an official report of Morris J. Miller to the Secty. of War dated July 25, 1819. Substantially the same is reported in Stone, *Life and Times of Red Jacket* (Albany 1866) p. 375.

"Has Georgia ever, before her late laws, attempted to regulate the Indian communities within her limits? It is true, New York extended her criminal laws over the remains of the tribes within that state, more for their protection than for any other purpose. These tribes were few in number, and were surrounded by a white population. But, even the state of New York has never asserted the power, it is believed, to regulate their concerns beyond the suppression of crime." (p. 590.)

"If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. * * * Under such circumstances, the agency of the general government, of necessity, must cease." (pp. 593-594.)

Mr. Justice McLean's views as to the limitations on the federal power over Indians were again illustrated in 1834, in the case of *United States* v. *Bailey*, 1 McLean 234; 24 Fed. Cas. 937, no. 14495. At Circuit in Tennessee there came before him the case of a white man indicted under a federal act of 1817 for killing another white man in the Cherokee Reservation. He held the act asserting federal jurisdiction over such a crime to be unconstitutional, as beyond the power of Congress to "regulate commerce with the Indian tribes." Incidentally, he referred again to the fact that "the state of New York for many years has punished its citizens for crimes committed in the Indian territory within its limits."

In 1859 Mr. Justice McLean was still a member of this Court, when New York's jurisdiction over a Seneca reservation was upheld in direct litigation. *New York ex rel. Cutler* v. *Dibble*, 21 How. 366. The statute which was involved dated back to 1813, when New York forbade cutting of timber on Indian lands, prosecution to be by the Indian Agent appointed by the United States (L. 1813 c. 91). In 1821 the Senecas petitioned the State, asserting

that the Indian Agent had been negligent in enforcement of the statute, and requesting that the State assume more direct responsibility.* By amendment district attorneys in the respective counties were made responsible for prosecuting all intruders on Indian lands (L. 1821 c. 204). It was the action of the Genesee County Judge, Dibble, in removing Cutler and other alleged intruders from the Tonawanda reservation, under authority of that statute, which was challenged in the case cited. The statute was held constitutional and the removal of the intruders was upheld, this Court saying:

> "Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of the State to make such regulations to preserve the peace of the community is absolute and has never been surrendered."

The Senecas were a bitterly divided people for some years after 1838, as a result of an iniquitous treaty in that year purporting to surrender all their New York reservations. The Cattaraugus and Allegany reservations were saved to them by a compromise treaty of 1842, and for the past hundred years the main body of the Senecas has lived upon those two reservations. The Tonawanda band seceded and eventually saved its own reservation in another treaty of 1857. Dissatisfied with the guardianship of the United States, they stipulated in the treaty that the reservation be transferred from the trusteeship of the Secretary of the Interior to that of the State Comptroller. Laws

* The petition was dated February 21, 1821, signed by Red Jacket, Cornplanter and others, and is in Assembly mss., N. Y. S. Library, Vol. 41 pp. 235, 243.

defining their government were enacted at their request, and since that time the relationship between the Tonawanda band and the State has rarely been questioned.*

The State was called upon by the main body of Senecas to provide it, likewise, with a body of laws defining the functioning of its government. John C. Spencer, who was Secretary of War in 1841-1843 and who appointed his father, Judge Ambrose Spencer, to preside over the compromise treaty of 1842, assisted the Senecas in drafting and procuring the enactment of this legislation.† In 1848 occurred the Seneca "revolution" or change to government under a written constitution, and both the United States and the State promptly recognized the new government.

---

* The treaty of 1838 is in 7 Stat. 550, 557 and II Kappler 502, 509; that of 1842 is in 7 Stat. 586 and II Kappler 537; and that of 1857 is in 11 Stat. 735 and II Kappler 767. An account of these transactions is in Assembly Doc. No. 51 of 1889, pp. 24-31. The original legislation for the Tonawanda band was L. 1860 c. 439, 481, and L. 1861 c. 283, and the petition of the Indians for those laws is Assembly Doc. No. 28 of 1860, also V Gov. Mess. 199. See, as to the history and present status of the Tonawanda band, *United States* v. *National Gypsum Co.*, 141 F. 2d 859 (C. C. A. 2d Cir., 1944).

† The legislation was L. 1845 c. 150, subsequently amended by L. 1847 c. 365. The fact that the law was petitioned for by the Senecas with the assistance of John C. Spencer appears from Senate Docs. 93, 94 and 104 of 1845. Also a letter dated March 26, 1849, from Congressman Dudley Marvin to Secty. of Int. Ewing, now in the National Archives, Indian Office papers received, said of the 1845 and 1847 statutes: "These acts to which I have called your attention were not imposed upon the Indians by the State Legislature against their wishes. The attention of the Legislature in each instance was called to the subject by petition from the Indians themselves. And, as I am informed, the Indians having agreed among themselves as to the general features of the measures proposed for their improvement, a program was submitted by their agent to that able counsellor the Honorable John C. Spencer, who threw them into form, giving the Indians the benefit of his own suggestions, and that the respective bills thus prepared, after undergoing some slight modifications in the Legislature, were enacted into laws." See also Mr. Spencer's letter of March 1, 1850, appended to Senate Doc. No. 108 of 1850, p. 12.

A letter dated March 13, 1849, from Commissioner of Indian Affairs Medill to Secretary Ewing suggested transmission to State authorities of copies of documents indicating their actions:

> "That State having also relations with the Indians, and the subjects referred to in the above communications being now under consideration by her legislature on a memorial similar to that to the President." (National Archives, 6 Ind. Of. Rep. Bk. p. 126.)

The State's recognition of the new Seneca government was expressed by L. 1849 c. 378.

A letter of May 2, 1850, from President Zachary Taylor to the chiefs of the Seneca Nation, declined to reverse the action previously taken, saying:

> "It has also received the sanction of the State of New York, which claims a guardianship concurrent with that of the United States over the Seneca Nation. If therefore any change be now made it must be by the authorities of that State as well as by the action of the United States Government." (Copy in National Archives, Indian Office papers.)

The annual report of the Commissioner for 1850, at page 41, spoke optimistically of the condition in which the Senecas in New York had been placed, "by the humane legislation of the State."

Another illustration of the official viewpoint of that period as to relations subsisting between the State and the Seneca Indians is found in the 1864 annual report of the Commissioner, a letter from him to the President of the Seneca Nation, saying:

> "The adoption, by the Senecas, of a republican form of government, and a written constitution, was, I understand, an act of mature deliberation, done under

> proper authority from the State of New York conferring upon them powers of incorporation. It was duly reported to this department, and fully recognized and confirmed by it."

In various annual reports of the Commissioner and similar official documents in the latter part of the nineteenth and early twentieth century the existence and propriety of such State legislation were acknowledged from time to time. Thus, in the Commissioner's report for 1874, p. 23, it was said concerning the New York Indians: "The jurisdiction of the criminal courts of New York has already been extended over them." And his 1889 report said: "The People of the Seneca Nation are governed by two sets of laws—the laws of the State of New York, which was enacted for the protection and improvement of the Seneca Nation of Indians, on the one hand, and the ancient customs and usages of the Senecas on the other; and quite frequently they claim rights under both." His report for 1892 contained a reference to the new Indian Law as recently codified by the New York Legislature, a copy of which was forwarded to the Commissioner by his New York agent. In his 1897 and 1898 reports the Commissioner included an instruction to his New York agent to procure an amendment to the N. Y. Indian Law which would allow appeals from peacemakers courts to State courts. This was finally done by L. 1914 c. 508, but was repealed by L. 1915 c. 561.

Similar examples of recognitions of State authority by the Federal Government could be given for each year. For present purposes the matter can be summarized from two congressional documents and the most recent opinion of this Court relative to the New York Indians, as follows:

In 1914 the Secretary of the Interior directed a survey to be made of the problem of Indian jurisdiction and con-

ditions in New York State, and reported upon it to Congress. This is generally known as the Reeves Report, because Mr. John R. T. Reeves conducted the survey. (*House Doc. No. 1590, 63rd Cong. 3rd Sess.*) Among other things, it listed the State statutes and decisions relative to the New York Indians, and made this general report as to jurisdiction over them, which was adopted by Secretary Lane as his report to Congress:

> "Conditions on the remaining reservations show a crying need for reform. Naturally one casts about for the reasons why these conditions should have so long been permitted to continue. First among these we find the question of jurisdiction over these Indians, State and Federal. Much needless confusion exists, a pretty general impression prevailing that the State has exclusive jurisdiction. This seems to have arisen from two causes, first, because New York was one of the Thirteen Original Colonies and the title to the lands involved never was in the Federal Government, and secondly, because the State has exercised jurisdiction, while the Federal Government, to a large extent, has not. In brief, the principle involved may be broadly stated, that all State laws beneficial to Indians will be upheld, while those of a detrimental nature will be scrutinized with greater care."

In 1929 Secretary Ray Lyman Wilbur expressed similar views about the New York Indians, in several letters to the Senate and House Indian Committees. The following quotation is from his letter of October 12, 1929 to Senator Frazier, printed at page 189 of a report of *Hearings on H. R. 9720, 71st Cong., 2nd Sess.* Secretary Wilbur advised Chairman Frazier:

> "The situation with respect to the Indians in the State of New York is somewhat peculiar and is entirely different from that of most of the other Indian problems with which this department must deal, particularly those west of the Mississippi River. This

> is due in large measure to the fact that New York was one of the thirteen original colonies and the legal title to none of the lands in that State is in the United States * * *. Again, shortly after the Revolutionary War, particularly prior to the adoption of our Federal Constitution and ever since that date, under the doctrine of State rights so strongly prevalent in those days, the State of New York has dealt directly with these Indian tribes claiming lands within her borders. In some instances such transactions were had with the sanction of the Federal Government and in others without such sanction other than such as might be implied. That is, as to those transactions between the Indians and the State not expressly sanctioned, no protest or opposition thereto has ever been raised, at least in so far as the legislative and executive branches of the Federal Government are concerned. * * *. In short, the State has heretofore exercised the usual prerogatives of sovereignty and jurisdiction over these Indians, while the Federal Government to a large extent has not."

See also, *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13 (1926), particularly pages 16-17, leading to the conclusion:

> "It is enough for present purposes to say that the State of New York, as early as 1849, at the request of the Indians, assumed governmental control of them and their property * * * and that Congress has never undertaken to interfere with this situation or to assume control."

The general course of development of control by the State over the Senecas, particularly criminal jurisdiction, with approval of the United States, has thus far been indicated. More specific attention can now be given to the development of the Allegany Reservation and Salamanca.

In 1797 and for many years thereafter the present site of Salamanca was an Indian village known as Bucktooth.

The principal factors which initiated a change to the present status were lumbering and railroads. In 1836 the New York Legislature refused to confirm contracts made by Blacksnake and other Seneca chiefs for leasing waterpower and timber-cutting privileges on the Allegany Reservation, its committee reporting that the proposal was against State policy (1836 Assembly Doc. No. 168). But in the same year the Legislature enacted a general statute which purported to authorize leases of lands from Indians for railway purposes (L. 1836 c. 316). It appears from the record in *People ex rel. Erie R. R. Co.* v. *Beardsley*, 41 N. Y. 619 mem., that construction was commenced on the Allegany Reservation in 1842 but was not completed until 1851.

Records of the Indian Office for 1842 and early 1843, now in the National Archives, show that the project was not opposed by it. The Indian Office was then under direction of T. Hartley Crawford as Commissioner and John C. Spencer as Secretary of War, the former from Pennsylvania and the latter from New York, and neither uninformed about local conditions.

In December 1842 the Indian Office received four long letters from the Allegany Reservation, all about a campaign of removing white intruders then being conducted by the local Indian Agent, one Stephen Osborn of Erie County. One letter was from John Boardman, who described himself as tavern keeper, ferryman and postmaster at Bucktooth, with facilities established on fifty acres leased from the Indians for a term of seventeen years, and profoundly disturbed by the proceedings of the Agent. Another letter was from W. L. Storke, who said he was acting r sident engineer for the railroad which "passes nearly twenty miles through said Reservation, and is in a very forward state of construction." He asked permis-

sion for the persons employed to return to their houses, "which were built only to reside on during the construction of said Rail Road." A third letter was from Blacksnake and other Seneca chiefs, asking that the persons operating mills or shops on the reservation under leases from them be undisturbed. Those three letters were addressed to the Secretary, and the fourth was from the Agent to the Commissioner, reporting his proceedings with apparent assurance that he was executing the policy of his superiors.

He was corrected upon that point by a letter of January 9, 1843, from Commissioner Crawford, as follows:

> "Your letter of 26th ult. respecting depredations upon the lands of the New York Indians and the measures taken by you to prevent them has been received. It is observed that you have caused warrants to be issued for the removal of individuals from the Indian lands. No such instructions were given to you nor was it intended that you should interfere by any legal process to effect that object. These are all private rights and must be settled by recourse to the laws of the state of New York by the parties injured. You are, therefore, requested to notify the injured parties of what you have done in the premises and suggest them to take charge of the legal measures instituted or otherwise adopt means to protect their own rights and interests as they may judge most advisable under the laws of the State of New York. Your own future operations will be governed by the instructions heretofore given you." (National Archives, Indian Office letterbook No. 33 p. 206.)

Agent Osborn promptly replied that he had made it clear to all concerned that his proceedings were not to be imputed to the United States, but were steps taken by him under State law by request of some of the Indians. Commissioner Crawford answered on January 28 that he was glad to be informed that Osborn's conduct was not by vir-

tue of his office, and there was no objection under those circumstances "in extending your aid to the Indians in their appeal to the laws of the State." (letterbook 33 p. 258).

In 1847 the State Comptroller, in response to a resolution of the Legislature, reported a list of intruders removed from the Allegany Reservation from 1839 to date, indicating that the same persons were removed repeatedly, at a considerable expense to the State for fees of justices and sheriffs (1847 Assembly Doc. No. 207). In that same year the Legislature authorized John Boardman to lease from the Senecas not to exceed twenty-five acres of land at Bucktooth for a term of five years for a residence, post office and ferry (L. 1847 c. 466). On May 15, 1851, there was a grand opening of the Erie Railroad, at which time President Millard Fillmore and members of his Cabinet and Senators rode the length of the newly constructed line in a special train. The junction with another railroad and the railroad shops at Salamanca came later, about 1863, and the settlement derived its name from the visit of a Spanish nobleman who owned stock in the railroad. As the community grew the Legislature was asked to confirm leases from the Senecas and from time to time did so, by general or special acts (see, for examples, L. 1866 c. 30, 263, 472).

Criminal jurisdiction probably followed as a matter of course. A legislative report in favor of erecting a highway bridge across the Allegany River east of Salamanca on the reservation recited that, "the county is burdened and taxed to pay for the administration of criminal justice over the Indian territory, and extending aid to the poor of their nation" (1859 Assembly Doc. No. 108).

Sometime in 1870 George Barker, Justice of the New York Supreme Court, held that the leases were void unless

ratified by Congress.* A resolution was adopted by the Legislature on January 26, 1871, asking that Congress enact legislation whereby white persons in the Town of Salamanca could acquire titles (L. 1871 p. 2179). The 1872 report of the Commissioner of Indian Affairs referred to such legislation as pending before Congress (pp. 200-201). Such a bill was introduced by Congressman Sessions on April 15, 1872, but as amended in the Senate was much broader than the bill eventually enacted in 1875; it was opposed by the Senecas and not signed by President Grant. (Cong. Globe, 42nd Cong. 2d Sess. pp. 2439, 4284; 3rd Sess. 761, 1666, 2137).

There undoubtedly was strong support for such legislation. The 1874 and 1875 reports of the recently established Board of Indian Commissioners indicate that its secretary, Whittlesey, visited the Seneca reservations in October 1874 accompanied by the Commissioner of Indian Affairs, Edward P. Smith, and his New York agent, Daniel Sherman. They addressed the Senecas in council and advised them to ask Congress to legalize and confirm the leases to white settlers in such manner as to benefit the whole people instead of a few lucky individuals. The 1875 report further said:

> "This board believes that the interests of all parties concerned would be advanced by a transfer of the Indians upon the seven reservations in the State of New York to the authorities of that State. * * * We are pleased to learn that the Interior Department heartily concurs in the recommendation."

---

* Petitioner's brief, page 17, appears to be in error in fixing 1874 as the date of this decision. A letter dated December 6, 1870, from H. F. Allen to Commissioner Parker, now in Indian Office papers received, refers to this decision, but does not give date or names of litigants. A petition to the Commissioner signed by Hudson Ansley and Daniel Heller on February 6, 1871, refers to the resolution recently passed by the Legislature and a similar resolution of the Cattaraugus supervisors on November 30, 1870.

The Commissioner, speaking for himself in his 1874 report at pages 23-24, was not so radical in his recommendations. He said:

> "These [New York] Indians have always been considered among the most intelligent of their race. They have completely adopted a civilized life, and except for the fact they have so long been treated as so many quasi independent sovereignties in the heart of the State of New York, there is no reason why they should not be declared citizens. The jurisdiction of the criminal courts of New York has already been extended over them, and pending the question of their full citizenship a great benefit would be secured to the New York Indians by authorizing the State to extend over the reservations its laws relating to highways, to stock, and to collection of debts.
>
> "The Allegany and Cattaraugus reservations are the largest in extent, the former lying forty miles along the Alleghany River and one mile in width. Across this reservation, along the Alleghany, the Erie, Atlantic and Great Western, and Rochester and State Line Railroads have been built, and the town of Salamanca and other small villages have grown up. These improvements were made on what were supposed to be leases legally granted by the Indians and confirmed by an act of the State legislature; but the courts have decided that neither Indians nor the State have power to make such leases. There are therefore improvements exceeding $1,000,000 in value, and occupied by over 2,000 people, upon lands without the authority of law. Three parties are interested in the question of this settlement of lease; the Seneca Nation owning this reservation in common, individuals of the nation who claim to have been occupants of lands used for railroad purposes, and the parties who have leased the land in good faith and have made large expenditures in improvements. The interests of all parties concerned require an early settlement of the questions involved in these leases. A satisfactory settlement can be arrived at only through a commission duly authorized, who shall make inquiries upon the report and give full hearing to all parties."

The Commissioner was making inquiries. In October 1874 he instructed Sherman to prepare a list of the outstanding leases and certain data about them. This was a substantial task, but on December 31 Sherman forwarded a massive compilation with his comment:

> "The ground rents charged by the Seneca Nation of Indians, and by individual Indians, are generally at fair and equitable rates."

On January 29, 1875, the New York Legislature enacted a resolution (Assembly Doc. No. 30) which was reprinted as a congressional document (H. Misc. Doc. No. 75, 43rd Cong. 2d Sess.). In the latter form it is printed in the appendix to petitioner's brief, pages 38-39.

The Act of Congress subsequently enacted seems to have had its origin in a report of the House Committee on Indian Affairs of April 20, 1874 (H. R. No. 478, 43rd Cong. 1st Sess.). Mr. Sessions' bill, H. R. 1053, had been referred to this Committee. The Committee's report stated the history of the matter, including the protest of the Senecas against the Sessions bill as amended in the Senate, and recommended as a substitute another bill described as H. R. 3080. This bill seems to be the one which passed the House without debate on May 4, 1874, and is printed in the Congressional Globe of that date, page 3581. It was in substantially its final form, and its last section, which is most relevant to the present matter, was identically in its final form, as follows:

> "That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages [including Salamanca], and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them, and all municipal laws and regulations of said State may extend over

and be in force within said villages: Provided, nevertheless, That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States."

There seem to have been no subsequent proceedings on the bill for nine months, and then, on February 2, 1875, it was debated extensively in the Senate and passed with a minor amendment (Cong. Globe, pp. 908-920). Nobody seemed to consider the language of the last section, with its reference to the "municipal laws and regulations" of the State, as requiring any explanation. Senator Hager of California made the only comment which is at all relevant to the present question. Opposing the bill, quite probably because of his anti-railroad leanings, he described at page 918 its alleged drastic effect upon the Indians, in part as follows:

> "Then subsequently the laws of the State of New York are extended over them, and they are subject to appear in the courts of that State and litigate matters in regard to rents and in regard to their possessions and lands; that is, you impose upon them these burdens, that they must necessarily go into the courts of justice with their lawyers, with their witnesses, and be subjected to all the expense that may be necessary to protect their rights if this bill shall go into operation. In my opinion it will amount to a confiscation or rather a sequestration of the entire lands of that nation."

On February 16, 1875, Mr. Sessions reported for a conference committee, which was agreed to, and on February 19 the bill was approved by the President (18 Stat. 330).

The statute which the State enacted, apparently as a complement to the Act of Congress of 1875, is now found in Indian Law § 71. This was originally enacted as chapter 188 of the Laws of 1881. For years McKinney's edition of

the statutes has carried the Act of Congress in a note to the section, apparently upon the view that the federal act authorized the State enactment. Furthermore, the relationship is apparent in the language of the two acts. The federal act says:

> "all municipal laws and regulations of said State may extend over and be in force within said villages: Provided, nevertheless, That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States."

The State act says:

> "All the general laws of the state are extended over and apply to the same; except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States."

The renewals of leases authorized by the 1875 Act (18 Stat. 330) could be for only twelve years, a limitation probably imposed in deference to a provision in the State Constitution which made invalid any lease of agricultural land for a greater period (N. Y. Const. 1846, Art. I § 14). By amendment of the 1875 Act in 1890 the limitation was made ninety-nine years (26 Stat. 558). The committee report in favor of such amendment is S. Rep. No. 1680, 51st Cong., 1st Sess. Ninety-nine year leases were negotiated in 1892 under circumstances described in the Commissioner's report for that year, pages 338-340, 345-347. The status of the leases in 1898 is shown by S. Docs. 145, 190, 55th Cong. 2d Sess. (Serial Vol. 3600), and in 1932 by S. Doc. No. 87, 72nd Cong. 1st Sess. (Serial Vol. 9521).

An affidavit in the present record (R. 18-20) describes the development and organization of Salamanca in recent years. It confirms the observation of District Judge Knight, based on the views of the United States Attorney

expressed in the present case, that the State has jurisdiction (R. 11).

Argument of Spetific Points.

(1). There is no inconsistency between the State jurisdiction asserted and the seventh article of the Treaty of Canandaigua.

This article of the Treaty is printed at pages 34-35 of petitioner's brief, and has already been commented upon at page 13 of this brief. We are unable to determine from the references to the provision at pages 13-14 and 17-18 of petitioner's brief whether it contends that the provision still controls criminal proceedings in Salamanca, but apparently it is contended that originally it did so.

Our position is that this treaty provision is utterly inapplicable to the present case, and has long since ceased to have any function for preserving peace in Salamanca. We also have quoted from the Indian non-intercourse acts of 1802, and thereabouts, and have referred to the development of a State jurisdiction in criminal matters affecting the New York Indians, to show that the 1794 Treaty never had the significance attached to it by the petitioner.

Without reference to those matters, it seems clear that Ray's murder of another white person in Salamanca in 1939 was not an injury to the Six Nations threatening to provoke warfare between them and the United States, and hence cognizable under the seventh article of the 1794 Treaty solely by diplomatic representations to be made by the Six Nations to the President.

(2). Indian Law § 71 is constitutional even without express authorization by Congress.

We shall assume that Congress may, if it sees fit, extend the jurisdiction of the federal courts to the crime now involved, that of murder by one white man against an-

other within Salamanca, upon the ground that it has a relationship to Indian welfare, even though somewhat remote. This assumption may be unwarranted (*United States* v. *Bailey*, 1 McLean 234; see also *U. S.* v. *Rogers*, 4 How. 567, 572) but our present case does not require us to argue against it.

As we shall show under the fifth subheading, there is no Act of Congress which confers upon federal courts jurisdiction in such cases as the present, or which forbids the State courts to exercise such jurisdiction. And there is a strong historical justification for State criminal jurisdiction over the New York Indians, previously stated herein.

It may reasonably be assumed that the power of Congress to regulate commerce with the Indian tribes, derived under the same clause with the power to regulate interstate commerce, is of similar nature, and that state laws are valid unless and until Congress has preempted the field, either by inconsistent legislation or an indication that there be no legislation upon the specific matter. *United States* v. *Holliday*, 70 U. S. 407; *Hanley* v. *Kansas City*, 187 U. S. 617; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651; *United States* v. *McGowan*, 302 U. S. 535, 539. Upon any particular problem arising as to jurisdiction over the New York Indians, the approach best supported by constitutional law and by history is that the State has jurisdiction unless and until Congress has taken it. Cf. *People ex rel. Cusick* v. *Daly*, 212 N. Y. 183, 196-197. That is also the only judicial approach which will avoid anarchy on the reservations.* Upon that view Indian Law § 71 so far as involved herein is constitutional, even without any authorization by Congress.

* See *The Problem of Iroquois Law and Order*, by Hoebel, in "The American Indian" (pub. by Am. Asso. on Ind. Af., 1945) Vol. 2 No. 3 pp. 12-20; also 1924 *Ann. Rep. Bd. of Ind. Comrs.*, pp. 6-7.

(3). However, Indian Law § 71 is authorized by Congress in the 1875 Act.

For many years McKinney's edition of the statutes has carried the Act of Congress in a footnote to Indian Law § 71, upon the view that the federal act of 1875 authorized the State enactment of 1881. The following comparison of statutory language points most directly to that relationship. The federal act says:

> "All municipal laws and regulations of said State may extend over and be in force within said villages: Provided, nevertheless, That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States."

The State act says:

> "All the general laws of the state are extended over and apply to the same; except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States."

That the Legislature thought it was acting upon an authorization derived from the Act of Congress, seems clear from that comparison of language. After all these years there should be no conclusion that it erred, unless such conclusion is very strongly supported. It is submitted that the history of the Act of 1875, previously stated, and its various other provisions, do not incline to that conclusion, but on the contrary incline to the conclusion that Congress intended to authorize the State jurisdiction expressed in Indian Law § 71.

(4). The Forness decision does not hold to the contrary.

That the *decision* of the Circuit Court of Appeals in *United States* v. *Forness*, 125 F. 2d 928, did not bear directly upon Indian Law § 71, is apparent from the fact that the

Circuit Court seems to have been unaware of its existence. There is no reference to it in its lengthy opinion. Likewise the opinion ignored such leading decisions relative to the New York Indians as *New York ex rel. Cutler* v. *Dibble*, 21 How. 366, and *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, and did not know of a document so germane to the Salamanca lease matter as the Comptroller General's special report upon it in 1932, *Senate Doc. No. 87, 72nd Cong., 1st Sess.*, Ser. Vol. 9521. Many less relevant materials were cited, but not those. Unserved and unanswered affidavits, stricken out of the record by the District Judge because they never became a part of the trial record, were used as a source for facts which were decisive upon the appeal (125 F. 2d p. 931, note 3, also p. 941), thus deciding against the appellees upon a case of which they never had notice and opportunity to address their arguments.

The Circuit Court opinion interpreted the reference to "municipal laws" in the 1875 Act of Congress, and concluded that it did not authorize Forness to rely upon C. P. A. §§ 997-999 (125 F. 2d p. 932). The State courts, in their opinions herein, accept that conclusion but suggest that the Circuit Court's reasoning ascribes a meaning to "municipal law" which is too narrow, having due regard to the language customarily used in 1875 (R. 27-32, 51-55). Because the argument of that matter is so fully set forth in the State court opinions it is not repeated in this brief.*

For present purposes, it is submitted that in 1875 Congress realized that Salamanca and the other villages were destined to be occupied and governed by white citizens, and

---

* See also: *The Cherokee Tobacco*, 11 Wall. 616, 623 (1870, Mr. Justice Bradley, "municipal law"); *The Scotia*, 14 Wall. 170, 183, 184 (1871, Mr. Justice Strong, "municipal regulation"); *Holden* v. *Joy*, 17 Wall. 211 212 (1873, Mr. Justice Clifford, "municipal purposes"); *United States* v. *43 Gallons*, 93 U. S. 188, 192 (1876, argument of Atty. Gen., "municipal regulation").

when it spoke of the extension of the "municipal laws" of the State over the villages it intended the general laws appropriate to regulate such communities, including the State's criminal law. For present purposes, that is all that needs to be decided, and even that may be more than is essential; beneficial as it would be to the City and State to have put at rest the disturbance created by the *Forness* opinion.

(5). Salamanca is not "Indian country" and hence 25 U. S. C. § 217 does not render 18 U. S. C. §§ 451 and 452 applicable.

As previously stated, we assume for present purposes that Congress has power to enact legislation reaching the present case. Undoubtedly Congress has broad powers where Indians are involved even incidentally, and they might be held to extend to those matters.

The petitioner's position is that Salamanca is "Indian country" within the meaning of 25 U. S. C. § 217 (Pet. br. pp. 19-20), hence, 18 U. S. C. § 451 subsec. 3 and § 452 apply (p. 18), and make murder committed in Salamanca a federal offense. Judge Conable said this was "the serious contention" made by the petitioner before his Court (R. 22).

Sections 451 and 452 accomplish nothing in the present case unless Salamanca is "Indian country." The latter section merely defines murder. The former says that crimes and offenses (including murder) "shall be punished as herein prescribed":

> "When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

Salamanca has never been reserved or acquired for the exclusive use of the United States. It is not under its exclusive jurisdiction as a matter of fact; and § 8 of the Act of 1875, providing that certain laws of the State shall "be in force within said villages," shows clearly that the United States disclaims exclusive jurisdiction over Salamanca. See, upon this point, *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 652; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 141; *Adams* v. *United States*, 319 U. S. 312. And of course Salamanca has never been acquired by the United States with the consent of the State for a fort, magazine, arsenal, dockyard, or other needful building. Section 451 is obviously irrelevant to the situation now presented, unless some other provision makes it relevant.

We come, then, to 25 U. S. C. § 217, which provides as follows:

> "Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Our contention is that this provision about "Indian country" has no application to any part of any Indian reservation within the State of New York, and never had. With stronger reason, it has no application to the City of Salamanca.

The provision, like several others now found in Title 25 of the U. S. Code, is from the Indian non-intercourse act of 1834 (4 Stat. 729), which in turn was derived from similar acts of 1802 (II Stat. 139), 1799 (I Stat. 743), 1796 (I Stat. 469), 1793 (I Stat. 329) and 1790 (I Stat. 137).

In the Act of 1834 the provision now involved was § 25, reading as follows:

> "So much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: Provided, the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

The purpose of the proviso was to leave to Indian justice crimes which involved only Indians and their property, as was held by the Court in 1883 in the case of *Ex parte Crow Dog*, 109 U. S. 556. As a result of that decision there was passed in 1885 the "Seven Major Crimes Act" (23 Stat. 385; 18 U. S. C. § 548), which applied to the specified crimes, not only when committed in the territories, but also when committed by an Indian upon a reservation within a State. The latter branch of the act was sustained, not upon the ground that such reservations are within the ordinary jurisdiction of the United States, but upon the special ground that the Indian tribes are the wards of the nation. See as to this, *United States* v. *Kagama*, 118 U. S. 375, 383, 384, and *Donnelly* v. *United States*, 228 U. S. 243, 270-272. Upon this ground the specified crimes when committed upon a New York reservation are within the jurisdiction of the federal courts since 1885 (*People ex rel. Cusick* v. *Daly*, 212 N. Y. 183), although from 1802 until 1885 the State asserted and maintained sole and exclusive jurisdiction over crimes committed upon the reservations, including the murder of one Indian by another.

The petitioner's brief does not rely upon 18 U. S. C. § 548, probably because that provision for federal jurisdiction relates only to the specific crimes, including murder, when committed *by an Indian within a reservation*, and in the present case neither the petitioner nor his victim was an Indian. However, it has been thought helpful to show that the fact that certain crimes, when committed upon New

York reservations between certain persons, are triable in the federal courts, has no tendency to show that such reservations are "Indian country" within the meaning of 25 U. S. C. § 217, and that *People ex rel. Cusick* v. *Daly*, 212 N. Y. 183, is no authority for granting the present writ.

Coming now to the immediate question, whether Salamanca is "Indian country," it was expressly decided in the negative in 1890 by the Circuit Court, in the case of *Benson* v. *United States*, 44 F. 178. Benson operated a barroom in Salamanca by license from the State, but federal authorities prosecuted him under what is now 25 U. S. C. § 241 (also derived from the Act of 1834, § 20) for introducing intoxicating liquors into the "Indian country." Benson was convicted by the District Court, but that judgment was reversed by the Circuit Court, which said that the "Indian country" did not describe any of the reservations of New York State. The opinion has every appearance of having been carefully considered. No quotation is made from it, because it is not excessively long, and is available to be read in its entirety.

The case of the *New York Indians*, 5 Wall. 761, is cited in petitioner's brief p. 19 for an inference that it assumed the Allegany Reservation was "Indian country." There is no reason to suppose such a question was considered. See the summary of that case in the Appendix to this brief.

There is no "Indian country" east of the Mississippi River, because the definition of such country in the Act of 1834 limited it, as to lands east of the Mississippi, to lands not included within any State. *Bates* v. *Clark*, 95 U. S. 204, 206-208; *Ex parte Crow Dog*, 109 U. S. 556, 560-562.

It is an odd fact that *Bates* v. *Clark* and cases which have followed it as to the meaning of the definition of "Indian country" in the Act of 1834, although they reached the result intended by Congress, made themselves much needless trouble by having overlooked the report of the House committee which reported the bill and explained its meaning. This is *House Report No. 474, 23rd Cong., 1st Sess.*

The Committee on Indian Affairs, to which had been referred President Jackson's message upon Indian affairs, reported three bills, and a report of 131 pages and a map explaining them. Two of the bills were adopted, one for the reorganization of the Department of Indian Affairs (4 Stat. 735), and the Indian non-intercourse act now involved (4 Stat. 729).

At pages 1 and 2 the report had this to say upon the subject now involved:

> "*The Indian country*, to which the bills reported refer, will include all the territory of the United States west of the Mississippi, not within Louisiana, Missouri, and Arkansas, and those portions east of that river, and not within the limits of any State, to which the Indian title is not extinguished. The Southern Indians are not embraced within it. Most of them have agreed to emigrate. To all their lands, with the exception of those of a part of a single tribe, the Indian title has been extinguished; and the States in which the Indians of that excepted tribe remain, have extended their laws over them. In this state of things, the committee, without inquiring whether the States have a right so to do, do not feel disposed, by any act of theirs, to raise up anew that subject of controversy. Their conviction is, that the remaining Indians, at the South, will find it for their best interests to join their brethern at the West. The well informed and intelligent of their nation

must have seen that, involved as they are in the conflict that surrounds them, they cannot remain where they are as a nation: and that their future hopes, and even existence, are best consulted in not including their already allotted lands within the Indian country."

Note that the comma, missing from the bill and from the Act, after the word "State" in the first sentence, was present in the report. This was the same comma which the Court deciding *Bates* v. *Clark* found it necessary to supply. Moreover, the committee made clear that the country of the Cherokees in Georgia and North Carolina, notwithstanding the failure of the United States to extinguish their title to that country, which gave rise to so much trouble, was not to be "Indian country." With stronger reason, then, were the reservations in New York not "Indian country."

Looking at a map of the United States in 1834, it will be seen that Michigan Territory (including what is now the states of Michigan and Wisconsin) was the only land east of the Mississippi not then within a state, and that within its borders were the lands of the Menominee, Winnebago, Ottawa, Miami, Chippewa and other tribes, numbering about 15,000 Indians. Michigan Territory was therefore within the "Indian country" under the Act of 1834, but ceased to be such, either when the Indian title was extinguished, or when it was organized into the states of Michigan and Wisconsin, whichever happened first. New York reservations were not "Indian country" for the purposes of regulation by the Act of 1834, and hence have never been regulated by provisions of U. S. Code, Title 25, applicable to the "Indian country," which includes § 217.

Although a statutory revision of 1878 omitted the definition of "Indian country", it has been held that it is assumed in the provisions still using the phrase, and that its interpretation in *Bates* v. *Clark* still applies. *Ex parte Crow Dog*, 109 U. S. 556, 562; *United States* v. *Le Bris*, 121 U. S. 278, 280; *Clairmont* v. *United States*, 225 U. S. 551, 557-558.

Cases relative to the western states should be noticed, although irrelevant for present purposes. A murder involving non-Indians, committed upon an Indian reservation, if within one of those states admitted without an express exception in favor of the federal jurisdiction, is triable within the state court and not within a federal court. *United States* v. *McBratney*, 104 U. S. 621; *Draper* v. *United States*, 164 U. S. 240. *Pickett* v. *United States*, 216 U. S. 456, cited by petitioner's brief at p. 28, merely illustrates the corollary, that the federal government can and sometimes has expressly reserved such jurisdiction in western states. *Donnelly* v. *United States*, 228 U. S. 243, likewise cited (Pet. br. p. 29), involved a murder of an Indian by a white man on a reservation in California, held to be triable in a federal court.* The suggestion made by petitioner's brief in the same paragraph wherein the last mentioned case is cited, seems to be that broader jurisdiction over Indian reservations is possessed by some western states than by any of the original states, thus attempting to explain the *McBratney* and *Draper* decisions. This

* The Court in the *Donnelly* case distinguished the *McBratney* and *Draper* cases upon the ground that no Indian was involved in those two cases, whereas Donnelly had murdered an Indian (see 228 U. S. at p. 271). It is sufficient for present purposes to note that the facts of the present case place it with the McBratney and Draper cases. Actually our position is that all these western cases are irrelevant, and that we neither take help from the McBratney and Draper cases nor are opposed by any western cases there may be of different tendency.

suggestion is the exact contrary of what has usually been accepted in statement and practice.

Historically, and as a matter of constitutional law, the original states possess full powers of sovereignty except as they surrendered certain specific powers by entering into the Union; and the western states which never were fully independent or confederated sovereignties possess the powers inuring to them upon admission to the Union, which cannot be greater than those retained by the original states and in some instances are restricted. In matters relating to the Indians the powers of the original states are usually supposed to be greater than those of the western states. The quotations from Secretary Lane and Secretary Wilbur, at earlier pages of this brief, illustrate this proposition.

Concluding under this subheading, it is respectfully submitted that the question as to the Acts of Congress cited by the petitioner should be decided to the effect that the City of Salamanca is not "Indian country" as that phrase is used in 25 U. S. C. § 217.

The arguments that New York established criminal jurisdiction over the reservations as early as 1802 and still possesses it except insofar as it has been restricted by 18 U. S. C. § 548, and that "all the general laws" of the State extend over Salamanca by virtue of the Act of 1875 and Indian Law § 71, are alternative and supporting arguments to the same conclusion.

Conclusion.

For the reasons stated, the Supreme Court of the State of New York had jurisdiction of the crime involved, the murder in Salamanca in 1939 of one white person by an-

other white person, and the judgment below should be affirmed.

December 5, 1945.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State of New York,
Attorney for the State and Warden.

ORRIN G. JUDD,
Solicitor General,
HENRY S. MANLEY,
Assistant Attorney-General,
of Counsel.

APPENDIX.

Digest of All Decisions by the Supreme Court of the United States and the Circuit Court of Appeals, Second Circuit, relative to the New York Indians, to November 30, 1945.

Supreme Court of the United States

Fellows v. *Blacksmith*, 19 How. 366, 60 U. S. 366 [Tonawandas, 1857] Reported below, same title, 7 N. Y. 401. In 1846 F took possession, under 1838 and 1842 treaties, of a saw-mill on the Tonawanda reservation owned by B, who sued for the trespass. F justified under the treaties. All courts held against him; the State courts because B had not been paid his "improvement money", and the Sup. Ct. on the ground that until U. S. executed the treaties by putting F in possession he could not take it.

New York ex rel. Cutler v. *Dibble*, 21 How. 366, 62 U. S. 366 [Tonawandas, 1859] Reported below, People v. Dibble, 18 Barb. 412, aff'd 16 N. Y. 203; aff'd by Sup. Ct. People v. Soper, 7 N. Y. 429, is a similar case decided on a technical point. See also People ex rel. Blacksmith v. Tracy, 1 Denio 617, 1 How. Pr. 186. Review, by certiorari, of action of Genesee County Judge D in removing intruders C and others from Tonawanda reservation under N. Y. statute of 1821. The statute was held constitutional, and removal of the intruders was upheld by all courts.

The New York Indians; 5 Wall. 761, 72 U. S. 761 [Senecas, 1867] Reverses Fellows v. Deniston, 23 N. Y. 420, which reversed General Term, 3rd Dist. After the Senecas had surrendered all their N. Y. reservations by the treaty of 1838, possession to be given within five years, the State attempted to tax the lands by acts of 1840, 1841, 1842 and 1843, which provided that they should not "affect the right of occupancy of the Indians". After it became apparent by the compromise treaty of 1842 that the Cattaraugus and Allegany reservations would not be vacated, it was provided that no more taxes be imposed against those. In the Court of Appeals it was held, on concession of Comptroller D, that the taxes against the Cattaraugus and

Allegany reservations were void; but it was held that those against the Buffalo Creek reservation, even before the Senecas left it in 1842, had no tendency to disturb their rights and were valid against F and others, the white purchasers. Before the Sup. Ct. the counsel for D argued only for the Buffalo Creek taxes. The Sup. Ct. disregarded the distinction, lumped all together in its opinion, and out of its superior tenderness for Indian rights relieved F and other white land speculators of the taxes imposed against their Buffalo Creek lands. The opinion suggested that such taxes, even with the qualifications imposed to protect the Indians, might be used to embarrass or disturb the tribe; but the basis for the suggestion is not made clear.

Seneca Nation v. *Christy*, 162 U. S. 283, 16 S. Ct. 823 [Senecas, 1896] Affirms 126 N. Y. 127, which affirmed 49 Hun 524. The suit was ejectment brought in the State courts by the Seneca Nation to recover the "Mile Strip" in the Town of Brant, Cattaraugus County. Decision was against them, on the ground that it had been held in Strong v. Waterman, 11 Paige 607, that they could not sue as a tribe except by an enabling act, and in availing themselves of the N. Y. statute of 1845 (see Indian Law § 54) they were subject to the State statute of limitations, which barred their suit. This suit involved directly a treaty of August 31, 1826, made between the Senecas and representatives of the Ogden Land Co., a U. S. Comr. being present apparently as an "umpire", and the Senate having withheld its approval on the ground that it was unnecessary. The briefs asserted that about forty transactions of similar nature entered into between 1796 and 1850 (see Assembly Doc. No. 51 of 1889, pp. 190-381) were drawn in question by this test case. The same broad issue subsequently arose in Deere v. St. Lawrence R. P. Co., 32 F. 2d 550, and U. S. v. Franklin Co., 50 F. Supp. 152.

New York Indians v. *U. S.*, 170 U. S. 1, 18 S. Ct. 531. *U. S.* v. *New York Indians*, 173 U. S. 464, 19 S. Ct. 487 [1898, 1899] Appeals from decisions of U. S. Court of Claims, relative to reparation for Kansas lands. Some

of the findings are of historic interest, but relations of the Indians to the State were not involved.

Onondaga Nation v. *Thatcher*, 189 U. S. 306, 23 S. Ct. 636 [1903] Writ of error from decision at 169 N. Y. 584, which affirmed 53 App. Div. 561, dismissed for lack of a federal question. This case did not decide any question about relations of Indians to State and Federal governments, but involved a lively controversy about some ancient wampum belts, now in the State Museum under authority of L. 1899 c. 153.

People ex rel. Kennedy v. *Becker*, 241 U. S. 556, 36 S. Ct. 705 [Senecas, 1916] Habeas corpus, relative to three Indians arrested for spearing fish in a creek in Erie County outside the reservation, but within lands ceded by treaty of Big Tree, wherein the Senecas retained the right to hunt and fish. Indians were represented by George P. Decker, supported by U. S.; opposed by Atty. Gen. of N. Y. All courts decided against them (165 App. Div. 881; 215 N. Y. 42). It was held that the reservation of fishing rights was not unlimited, but merely to fish subject to the same laws as white persons. "We assume that these Indians are wards of the United States, under the care of an Indian agent; but this fact does not derogate from the authority of the state, in a case like the present, to enforce its laws at the locus in quo."

U. S. ex rel. Kennedy v. *Tyler*, 269 U. S. 13, 46 S. Ct. 1 [Senecas, 1925] Affirms 294 F. 111. K attempted to enforce a Peacemaker's decree, in violation of a writ of prohibition which had been issued by the N. Y. Supreme Court, in support of probate proceedings taken in Erie County Surrogate's Court on the will of a deceased Seneca. K was arrested for contempt, and the present proceeding was habeas corpus brought in the federal courts against the Erie County Sheriff, T, to obtain K's release, on the theory that the proceedings of the State courts were void. In addition to the attorneys for the parties originally interested (Thomas Larkin for the widow and George P. Decker for the Seneca officials) the State Atty. Gen. appeared for T and the U. S. Atty. Gen. supported the Senecas on their appeal. The District Court dismissed the writ on the

ground that the State statutes were controlling. The Sup. Ct. affirmed on the more cautious ground that the questions should first be litigated in the State courts, and not by habeas corpus in the federal courts.

Circuit Court of Appeals, 2nd Circuit

Benson v. *United States*, 44 Fed. 178 (Cir. Ct.) [Senecas, 1890] B operated a barroom in Salamanca by license of the State, but Federal authorities prosecuted him under what is now 25 U. S. C. § 241, for introducing intoxicating liquors into "the Indian country". Salamanca was released to white persons under an Act of Congress of 1875 as amended, and in their possession, but was within the boundaries of the Allegany reservation. B was convicted by the District Court, but that judgment was reversed by the Circuit Court, which said that "Indian country" did not describe any of the reservations of N. Y. State.

United States v. *Boylan*, 265 Fed. 165 [Oneidas, 1920] affirming 256 Fed. 468. About 1843 the Oneida reservation was broken up by arrangement between the Indians and the State. In 1885 one Honyost, an Oneida in possession of one of the allotments of 32 acres, gave a mortgage which later was assigned to Patrick Boylan. In 1905 Boylan's executor foreclosed the mortgage and obtained the property, whereupon one of the heirs commenced a partition action and the property was sold by referee to B. See Boylan v. George, 133 App. Div. 514. The U. S. brought an action of ejectment against B and was successful. The courts laid some emphasis on the fact that the Indian conveyances had not complied with the N. Y. act of 1843, but also said that only the U. S. could break up the reservation, and held that the foreclosure and partition suits were void as to the U. S., and hence not res judicata. Opinion by Manton, Hough concurring, Ward dissenting with opinion on ground tribal organization was terminated. An attempted appeal to Sup. Ct. was taken too late. 257 U. S. 614 mem.

Deere v. *St. Lawrence R. P. Co.*, 32 F. 2d 550 [St. Regis, 1927] D brought suit on behalf of all members

of St. Regis Tribe, to eject the Co. from lands at Massena, which the State acquired in 1824 by treaty with the Tribe. The complaint was dismissed for lack of jurisdiction. There was no diversity of citizenship, the mere fact that D was an Indian did not confer jurisdiction, and the case did not "arise" under the treaties and laws of the U. S., although they were involved. Opinion by Manton, L. Hand and Chase concurring. Reported below, 22 F. 2nd 851.

Ex parte Green, 123 F. 2d 862 [Onondagas, 1941] Regardless of treaty status, Six Nations Indians have been made citizens and liable to draft for military service by Acts of Congress in 1924 and 1940. Cert. den., 316 U. S. 668.

United States v. *Forness*, 125 F. 2d 928 [Senecas, 1942] F was in possession of a business building in Salamanca, said to be worth $60,000, for which he was obligated, by a 99-year lease from the Senecas made in 1892 under the Act of Congress of 1875 as amended, to pay an annual rental of $4. In 1939, he being several years in arrears, the Senecas declared a cancellation. U. S. brought suit to enforce the cancellation, and meanwhile the Senecas offered to continue the lease for a rental of $115 annually. Various defenses available under State laws were held unavailable, on the ground that "State law does not apply to Indians except so far as the United States has given its consent." Judgment of the District Court (37 F. Supp. 337) was reversed and judgment directed for U. S. Opinion by Frank, concurred in by A. N. Hand and Clark. Certiorari was denied by Sup. Ct. (316 U. S. 694) with result that F was compelled to pay the higher rental. Several hundred other suits resulted (Wood v. City of Salamanca, 289 N. Y. 279; Salamanca v. Seneca Nation, 47 F. Supp. 939; United States v. Adamic et al., 49 F. Supp. 221) and in late 1943 or early 1944 many lessees were forced by the U. S. to take new leases. The State refused and its old leases were reinstated by the Senecas upon advice of the Int. Dept.

U. S. ex rel. Ray v. *Martin*, 141 F. 2d 300 [Senecas, 1944] affirming 54 F. Supp. 218 R, a white man, mur-

dered another white man in Salamanca and was convicted in a State court. This proceeding was for habeas corpus based upon the contention that only a federal court had jurisdiction, under 18 U. S. C. §451 subsec. 3, also 25 U. S. C. § 217. The Dist. Ct. held against him on merits and also ground that question should have been first presented to State courts. C. C. A. affirmed in opinion by Judge Frank upon second ground only. Judge Swan concurred, and Judge Clark concurred in separate memorandum on both grounds. Subsequently the State courts decided against R, 181 Misc. 925; aff'd 268 App. Div. 218; aff'd 294 N. Y. 61; cert. granted Oct. 8, 1945.

United States v. *National Gypsum Co. and State*, 141 F. 2d 859 [Tonawandas, 1944] reversing 49 F. Supp. 206. Gypsum leases made in 1921-1922 and 1936 under authority of Indian Law § 85 (L. 1873 c. 394) held constitutional. The entire history of the Tonawanda Reservation, particularly the treaty of 1857 and the deed of 1862 under which it was turned over to the State and the statutes under which it has been regulated, was considered, and the jurisdiction of the State was upheld. See also 42 F. Supp. 752.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 12 1945
CHARLES ELMORE CROPLEY
CLERK

No. 158

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE PEOPLE OF THE STATE OF NEW YORK EX REL. DONALD A. J. RAY, PETITIONER

v.

WALTER B. MARTIN, AS WARDEN OF ATTICA STATE PRISON, ATTICA, NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF WYOMING COUNTY, STATE OF NEW YORK

BRIEF FOR THE UNITED STATES, AMICUS CURIAE

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and treaties involved	2
Statement	3
Summary of argument	6
Argument:	
The courts of the State of New York have jurisdiction to try one white man for the murder of another even though the crime was committed within the limits of an Indian reservation	8
A. Without regard to the Act of February 19, 1875, the jurisdiction of the state courts is clear	9
B. The Act of February 19, 1875, does not extend the general laws of the State of New York to the lands in question	17
Conclusion	22
Appendix	23

CITATIONS

Cases:

Board of Comm'rs v. *Seber*, 318 U. S. 705	13
Crow Dog, 109 U. S. 556	10, 12
Donnelly v. *United States*, 228 U. S. 243	13, 15
Draper v. *United States*, 164 U. S. 240	12
In re Wilson, 140 U. S. 575	13, 16
Mason Co. v. *Tax Com'n*, 302 U. S. 186	14
New York v. *Dibble*, 21 How. 366	15, 16
The New York Indians, 5 Wall. 761	3
Pickett v. *United States*, 216 U. S. 456	13
Rice v. *Maybee*, 2 F. Supp. 669	19
Rice v. *Olson*, 324 U. S. 786	12
Surplus Trading Co. v. *Cook*, 281 U. S. 647	14
Thomas v. *Gay*, 169 U. S. 264	15
United States v. *Chavez*, 290 U. S. 357	12
United States v. *Forness*, 125 F. 2d 928, certiorari denied, 316 U. S. 694	18, 20
United States v. *Kagama*, 118 U. S. 375	13
United States v. *McBratney*, 104 U. S. 621	12
United States v. *Ramsey*, 271 U. S. 467	13
United States v. *Rogers*, 4 How. 567	13
United States v. *Soldana*, 246 U. S. 530	12
United States ex rel. v. *Tyler*, 269 U. S. 13	19
Utah & Northern Railway v. *Fisher*, 116 U. S. 28	15
Wagoner v. *Evans*, 170 U. S. 588	15
Worcester v. *Georgia*, 6 Pet. 515	16

Constitution and Statutes:	Page
U. S. Const., Art. I, sec. 8, cl. 17	14
Act of May 19, 1796 (Indian Intercourse Act), 1 Stat. 469	10
Act of March 3, 1799 (Indian Intercourse Act), 1 Stat. 743	10
Act of March 30, 1802 (Indian Intercourse Act), 2 Stat. 139	10
Act of March 3, 1817, 3 Stat. 383	11
Act of June 30, 1834 (Indian Intercourse Act), 4 Stat. 729	11
Act of February 19, 1875, 18 Stat. 330	17, 20
Act of March 3, 1885, 23 Stat. 362	10
Act of September 30, 1890, c. 1132, 26 Stat. 558	4
R. S., sec. 2145, 25 U. S. C. sec. 217	11, 13
Treaty of January 9, 1789, 7 Stat. 33	10
Treaty of November 11, 1794, Art. VII, 7 Stat. 44	9
18 U. S. C. secs. 451 and 452	16
25 U. S. C. sec. 231	16
Miscellaneous:	
Cohen, Handbook of Federal Indian Law (1942):	
Pages 358–365	10
Page 364	11
Page 421	19
Pages 422–423	1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 158

THE PEOPLE OF THE STATE OF NEW YORK EX REL. DONALD A. J. RAY, PETITIONER

v.

WALTER B. MARTIN, AS WARDEN OF ATTICA STATE PRISON, ATTICA, NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF WYOMING COUNTY, STATE OF NEW YORK

BRIEF FOR THE UNITED STATES, AMICUS CURIAE

OPINIONS BELOW

The opinion of the county court (R. 20–33) is reported in 181 Misc. 925. The opinion of the appellate division of the supreme court (R. 36–39) is reported in 268 App. Div. 218. The opinion of the court of appeals (R. 43–53) may be found in the advance sheets for 294 N. Y. at page 61. Prior to the institution of this proceeding in the state courts, petitioner had filed an application for writ of habeas corpus in the federal district court. The opinion of the United States District

Court for the Western District of New York (R. 7–12) is reported in 54 F. Supp. 218 *sub nom. Ex parte Ray,* while the opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 12–13) is reported in 141 F. 2d 300 *sub nom. United States* v. *Martin.*

JURISDICTION

The judgment of the county court sought to be reviewed was entered on March 8, 1945, in accordance with the order of remittitur filed in the court of appeals on March 2, 1945 (R. 55–57). Mr. Justice Jackson issued an order allowing appeal on May 16, 1945 (R. 60–61). The record was filed in this Court on June 23, 1945 (R. 64). On October 8, 1945, the appeal was dismissed for want of jurisdiction but, treating the appeal papers as a petition for writ of certiorari as required by Section 237 (b) of the Judicial Code as amended (28 U. S. C. sec. 344 (c)), certiorari was granted and the Solicitor General was invited to file a brief *amicus curiae* if so advised (R. 63).

QUESTION PRESENTED

Whether the courts of the State of New York have jurisdiction to try one white man for the murder of another when the crime was committed within the limits of an Indian reservation.

STATUTES AND TREATIES INVOLVED

Pertinent portions of the statutes and treaties involved are set out in the Appendix, *infra.*

STATEMENT

In 1939 in the Supreme Court of New York for Cattaraugus County, petitioner, a white man, was convicted and sentenced to life imprisonment for the murder of another white man in the City of Salamanca, New York, within the limits of the Allegany Indian Reservation of the Seneca Nation of Indians (R. 4–5, 15).[1] The conviction was affirmed by the Appellate Division of the Supreme Court, and leave to appeal to the Court of Appeals was denied. The jurisdiction of the Supreme Court to try petitioner was not challenged during the trial or on appeal. (R. 6.) The City of Salamanca had been established pursuant to the Act of February 19, 1875, 18 Stat. 330 (Appendix, *infra*), which, among other things, provided that boundaries should be located for the Village of Salamanca and certain other villages so as to include all lands within the Allegany Reservation occupied by white settlers, that Indian lands within the villages as surveyed could be leased for twelve-year periods, and that certain existing leases were ratified (secs. 1–4). The Act further provided (sec. 5) that the leases should be recorded in the same manner as leases of lands outside the reservation and that leases should pass by assignment, descent, etc., as provided by New York law, but that the Indians' interest therein

[1] The historical background of this reservation is outlined in *The New York Indians*, 5 Wall. 761. See also R. 16–19.

should descend according to the laws of the Seneca Nation. Section 7 provided that both the appropriate state court and federal court should have jurisdiction of actions to recover rents or possession of real property within the villages. Section 8 provided:

> That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: *Provided, nevertheless,* That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.

By the Act of September 30, 1890, c. 1132, 26 Stat. 558, the maximum term for renewal of leases was extended from 12 to 99 years. Many 99-year leases were executed, and at the present time Salamanca has a population of about 9,000, with only six or eight Indian families residing within the city (R. 19–20).

In 1943, petitioner filed an application for writ of habeas corpus in the United States District Court for the Western District of New York, alleging that the courts of the State of New York

were without jurisdiction of the offense for which he had been convicted, when committed within an Indian reservation (R. 6). The application was denied on the grounds that relief should first be sought in the state courts, and that in any event the state courts had jurisdiction because Congress had never vested exclusive jurisdiction over such a case in the federal courts (R. 7–12). The court concluded that there was no conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *United States* v. *Forness*, 125 F. 2d 928, certiorari denied 316 U. S. 694, in which it had been held that Section 8 of the Act of February 19, 1875 (Appendix, *infra*) did not extend the general laws of the State of New York over the City of Salamanca (R. 11). The order denying the application was affirmed by the circuit court of appeals on the ground that the application to a federal court was prematurely made; Judge Clark was of the opinion that the second ground relied upon by the district court was also good (R. 12–13).

In February 1944, petitioner applied for a writ of habeas corpus in the state courts, alleging that he was being confined under the commitment of a court which had no jurisdiction in the premises (R. 4–6). A judge of the Supreme Court for Erie County issued the writ (R. 3), but after hearing in the County Court of Wyoming County, the writ was ordered dismissed (R. 33–34), the

court holding that the Act of February 19, 1875, permitted the extension of the penal laws of New York to crimes committed by non-Indians within the City of Salamanca, and further, that the city was not Indian country within the meaning of Section 2145 of the Revised Statutes, 25 U. S. C. sec. 217 (Appendix, *infra*) (R. 20–33). The Appellate Division affirmed the order of the county court on the grounds that the City of Salamanca was not Indian country within the meaning of Section 2145 of the Revised Statutes, and that the section had no application to a crime committed in Indian country by one white person against another (R. 35–39). The Court of Appeals affirmed the order of the Appellate Division for the reason that there was no basis in the Constitution or any treaty or statute for an assertion by the Federal Government of exclusive jurisdiction over crimes committed by one non-Indian against another on the Allegany Reservation, and because the Act of February 19, 1875 (Appendix *infra*) made the general laws of New York applicable to the City of Salamanca (R. 43–55).

SUMMARY OF ARGUMENT

A

Neither the Treaty of November 11, 1794, 7 Stat. 44 (Appendix, *infra*) nor any of the Indian Intercourse Acts had the effect of depriving a state of jurisdiction of crimes by one white man

against another when committed within an Indian reservation. Even if construed as establishing federal jurisdiction over cases not involving Indians, such federal jurisdiction would not be exclusive and state laws would continue to be enforcible so far as compatible with federal laws and treaties. The City of Salamanca, occupied by whites under leases from the Seneca Indians, is "Indian country." Nevertheless, Section 2145 of the Revised Statutes, which provides for the extension to the Indian country of the federal laws applicable to crimes committed in places under the sole and exclusive jurisdiction of the United States, does not deprive the State of New York of jurisdiction of the murder of one white man by another in the City of Salamanca. Although the United States has broad jurisdiction over the Indians, their lands and their affairs, all authority over Indian lands not necessary to the proper exercise of federal jurisdiction is reserved to the state within which the land lies. Since the exercise by the state of jurisdiction of offenses by whites against whites does not interfere in any way with the federal-Indian relationship, petitioner, a white man, was properly tried by the state courts for the murder of another white man.

B

The court below erred in holding as an alternative ground for decision that criminal juris-

diction over the City of Salamanca was granted to the State of New York by the Act of February 19, 1875, which provided that "all municipal laws and regulations" of New York may be extended over the city. It is clear that the Act permitted only laws pertaining to the organization and government of municipalities to be so extended.

ARGUMENT

THE COURTS OF THE STATE OF NEW YORK HAVE JURISDICTION TO TRY ONE WHITE MAN FOR THE MURDER OF ANOTHER EVEN THOUGH THE CRIME WAS COMMITTED WITHIN THE LIMITS OF AN INDIAN RESERVATION

The narrow question presented by this case is whether the State of New York has jurisdiction of crimes, more specifically the crime of murder, committed by one white man against another in a city situated within the boundaries of an Indian reservation in that state. Petitioner has contended that the state courts are without jurisdiction because the federal courts have exclusive jurisdiction over all crimes committed on the reservation in question. The courts below have upheld, on varying grounds, the jurisdiction of the state courts to try petitioner for the crime of which he was accused. See Statement, *supra*. Although agreeing that the result reached is correct, the United States takes the position that the state's jurisdiction stemmed in no way from the

Act of February 19, 1875 (Appendix, *infra*) upon which the trial court and Court of Appeals relied as one of the grounds for their decisions, and that such Act is wholly immaterial to the issue involved. The United States also disagrees with the holdings of the county court and Appellate Division that the City of Salamanca was not "Indian country".

A. *Without regard to the Act of February 19, 1875, the jurisdiction of the state courts is clear.*—In contending that the state courts were without jurisdiction of crimes committed on the Indian reservation within the geographical limits of the state, petitioner (Br. 6–15) apparently places his chief reliance upon Article VII of the Treaty of November 11, 1794, 7 Stat. 44 (Appendix, *infra*) between the United States and the Six Nations including the Seneca Nation. He asserts (Br. 13) that by this article "jurisdiction of the misconduct of individuals which would, of necessity include non-Indian offenders, was exclusively vested in the Federal Government." However, as petitioner himself acknowledges (Br. 11), the purpose of the treaty was to establish peaceful relations between the whites and the Indians, and a mere reading of the article will plainly show that it was intended to cover only offenses by an Indian against a non-Indian and by a non-Indian against an Indian, and not offenses by one white man against

another or even one Indian against another.[2] The obvious purpose of the article was to revise that part of the unratified Treaty of January 9, 1789, 7 Stat. 33 (Appendix, *infra*) providing that various offenses by a white man against an Indian and vice versa were to be punished in the New York courts if committed in that state. By its terms Article VII of the 1794 treaty was merely a temporary arrangement, but it was complemented, as intended, by the Indian Intercourse Act of May 19, 1796, 1 Stat. 469 (Appendix, *infra*) which established procedures for the punishment of various crimes committed on Indian lands by whites against Indians and by Indians against whites, but significantly omitted all references to crimes by one white person against another.[3] Therefore, it is plain that neither the

[2] This distinction in the race of the persons involved in crimes committed in the Indian country is the keystone in the determination of federal jurisdiction of such crimes. See Cohen, Handbook of Federal Indian Law (1942), pp. 358–365. Until the enactment of Section 9 of the Act of March 3, 1885, 23 Stat. 362, 385 (Appendix, *infra*), in the absence of specific treaty provision, there was no federal jurisdiction over crimes committed in the Indian country by one Indian against another, so that only the tribe could punish the offender. *Ex parte Crow Dog*, 109 U. S. 556. Likewise, as will be shown, in the absence of specific treaty or statutory provision to the contrary, the states have exclusive jurisdiction of crimes in the Indian country in which only white persons are involved.

[3] The pertinent provisions of the Act of May 19, 1796, were carried over substantially unchanged into the Indian Intercourse Acts of March 3, 1799, 1 Stat. 743, and March 30, 1802, 2 Stat. 139.

1794 treaty nor any statute enacted immediately thereafter conferred upon the federal courts any jurisdiction over crimes committed by one white man against another in Indian territory.

Petitioner also relies upon Section 2145 of the Revised Statutes, 25 U. S. C. sec. 217[4] (Appendix *infra*) as a basis for the alleged exclusive federal jurisdiction of crimes in Salamanca (Br. 17–20). This Section provides, with exceptions not here material, that the "general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." In order for this provision to be of any assistance to petitioner it must first appear that the City of Salamanca is "Indian country" within the meaning of the Act, and then that the state courts were thereby deprived of jurisdiction of crimes committed by one white man against another in the Indian country. Both the county court and the Appellate Division held as one of the grounds for their decisions that the City of Salamanca was not Indian country within the

[4] This Section was derived from Section 25 of the Indian Intercourse Act of June 30, 1834, 4 Stat. 729. The latter was based upon Section 1 of the Act of March 3, 1817, 3 Stat. 383, which was, in turn, a revision of earlier Indian Intercourse Acts, all of which dealt with relations between Indians and non-Indians. See Cohen, Handbook of Federal Indian Law (1942), p. 364.

meaning of R. S. sec. 2145 (R. 33, 37–38). The Court of Appeals did not pass upon the issue, being of the opinion that petitioner's contention had some merit, but at the same time doubting whether the term "Indian country" could reasonably be applied to the City of Salamanca (R. 49–50). However, in this respect the United States agrees with petitioner. The City of Salamanca is located within the Allegany Reservation which belongs to the Seneca Nation. The term "Indian country" includes "any unceded lands owned or occupied by an Indian nation or tribe of Indians." *United States* v. *Chavez*, 290 U. S. 357, 364; *Ex Parte Crow Dog*, 109 U. S. 556, 561; cf. *Rice* v. *Olson*, 324 U. S. 786, 790–791. The fact the land in Salamanca is leased to white persons does not, as the Appellate Division thought (R. 37–38), change the result. *United States* v. *Soldana*, 246 U. S. 530.

But the denial of the state's jurisdiction of offenses by one white man against another is a different matter. This Court has held that, despite R. S. sec. 2145, newly admitted states have exclusive jurisdiction of offenses committed by white people against whites in the Indian country in the absence of some law or treaty to the contrary. *United States* v. *McBratney*, 104 U. S. 621; *Draper* v. *United States*, 164 U. S. 240. The theory of these cases was that upon a state's being admitted into the Union on an equality with the

other states, the federal government loses all control over offenses by one white against another on an Indian reservation within the territorial limits of the state.[5] *United States* v. *Ramsey*, 271 U. S. 467, 469; *Donnelly* v. *United States*, 228 U. S. 243, 271. Therefore, it is clear that the basis of the decision in the *McBratney* and *Draper* cases, *supra*, was the assumption that each of the original states had exclusive jurisdiction over crimes committed by whites against whites anywhere within its territorial limits, even on an Indian reservation.[6] We maintain that this assumption was correct.

Although undoubtedly the Constitution has given to the United States a broad jurisdiction over the Indians, their lands and their affairs (*Board of Comm'rs* v. *Seber*, 318 U. S. 705, 715; *United States* v. *Kagama*, 118 U. S. 375, 384–385),

---

[5] Thus, R. S. sec. 2145 was applicable insofar as offenses by whites against whites were concerned only in the territories of the United States. Cf. *In Re Wilson*, 140 U. S. 575. The case of *Pickett* v. *United States*, 216 U. S. 456, 458, cited by petitioner as authority for his contention that R. S. sec. 2145 was applicable to his offense (Br. 28), involved a murder committed in Indian country prior to the admission of Oklahoma as a state, and not, as stated by petitioner, an offense committed after statehood. Hence, the *Pickett* case is not in petitioner's favor, but to the contrary serves to emphasize the fact that R. S. sec. 2145 has a narrower application in a state than in a territory.

[6] This assumption was also made in *United States* v. *Kagama*, 118 U. S. 375, 383, and *United States* v. *Rogers*, 4 How. 567, 572.

this does not mean that a state has no jurisdiction whatsoever over an Indian reservation within its borders. The states have jurisdiction over all lands within their borders except insofar as exclusive jurisdiction has been vested in the federal government. Here no such exclusive jurisdiction vested in the United States pursuant to Article I, section 8, clause 17,[7] of the Constitution, nor has there been any cession by the state and acceptance by the United States of exclusive jurisdiction. The authority of the federal government over the Allegany Reservation, at least in the absence of plain language, is not to be carried beyond the point necessary to carry out its obligations to its Indian wards. Whether or not crimes committed by white men against white men on an indian reservation might become a matter of federal concern, as long as there has been no such assertion of the federal power, the jurisdiction of a state embraces an Indian reservation just as any other lands in the state. ***Surplus Trading Co.*** v. ***Cook,*** 281 U. S. 647, 651; ***Mason Co.*** v. ***Tax***

[7] Clause 17 provides that Congress shall have power:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;

Com'n, 302 U. S. 186, 210; *Thomas* v. *Gay,* 169 U. S. 264, 274. For example, the mere fact that property of a non-Indian is situated on an Indian reservation does not prevent a state from subjecting it to taxation. *Wagoner* v. *Evans,* 170 U. S. 588; *Thomas* v. *Gay,* 169 U. S. 264; *Utah & Northern Railway* v. *Fisher,* 116 U. S. 28. So, too, in *New York* v. *Dibble,* 21 How. 366, it was held that New York had such sovereignty of the person and property of Indians within the state that it could punish white people for intruding upon the Indian lands, there being no conflict with any treaty or Act of Congress.* With all the more reason, therefore, would the state have jurisdiction to punish when the crime is committed by one white against another. "The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered." *New York* v. *Dibble,* 21 How. 366, 370. It follows, therefore, that since neither the 1794 treaty nor any other provision of federal law vests exclusive jurisdiction to punish crimes committed by whites against whites on Indian reservations, the State of New York has juris-

* The *Dibble* case perhaps indicates a concurrent federal and state jurisdiction of some offenses committed by a white against an Indian, since it has been held that the federal courts would have jurisdiction of crimes coming within the purview of R. S. sec. 2145 committed by a white against an Indian in Indian country. *Donnelly* v. *United States,* 228 U. S. 243, 271–272.

diction to inflict punishment for the murder of one white man by another in the City of Salamanca.[9]

The conclusion reached is not contrary to the decision in *Worcester* v. *Georgia*, 6 Pet. 515, which held that in the circumstances of that case the state could not extend its laws over Indian lands. There the State of Georgia attempted to make illegal the activity of white men which was being carried on with the consent of the federal government and the Indians pursuant to treaty and statutory provisions, and the state was, therefore, interfering with the federal-Indian relationship. Cf. *New York* v. *Dibble*, 21 How. 366. But in the instant case there is no such interference; neither the person nor the

---

[9] Since it is clear that the United States does not have exclusive jurisdiction of Indian reservations within a state, it is plain that the provisions of 18 U. S. C. secs. 451 and 452 (providing for the punishment of murders committed in places under the exclusive jurisdiction of the United States) are of no moment here (see petitioner's brief, p. 18). As was said in *In re Wilson*, 140 U. S. 575, 578, "The words 'sole and exclusive', in section 2145, do not apply to the jurisdiction extended over the Indian Country, but are only used in the description of the laws which are extended to it." It is also obvious that 25 U. S. C. sec. 231 (permitting extension of state health and education laws to Indian reservations) and pending bills (providing for extension of state criminal laws to all individuals on a reservation) are not in any sense evidence that a state had no criminal jurisdiction whatsoever on an Indian reservation (see petitioner's Brief, p. 21). The statute and bills merely provide for the extension of laws previously applicable only to whites to Indians as well.

property of the Indians has been violated and there is no basis for the exercise of federal jurisdiction. It is, therefore, the position of the United States, as stated by the United States Attorney upon petitioner's application for writ of habeas corpus to the federal district court (R. 11), that this crime committed by a white man against another white man was cognizable in the state, not the federal, courts. On this ground alone, we think the decision of the court below was correct.

B. *The Act of February 19, 1875, does not extend the general laws of the State of New York to the lands in question.*—By the Act of February 19, 1875 (Appendix, *infra*) Congress validated leases already made by the Senecas to the whites, approved a system for future leases, and made provision for surveying and establishing boundaries for the villages which had sprung up within the Indian reservations. Section 8 of the Act provided in part that "all municipal laws and regulations" of New York might extend over and be in force within the villages. The court below interpreted Section 8 as making applicable in the City of Salamanca all the general laws of New York, holding that "all municipal laws and regulations" meant all the internal, domestic laws of the state (R. 51–55). See also the opinion of the county court (R. 24–33). This interpretation by the state court is in direct con-

flict with that by the United States Circuit Court of Appeals in *United States* v. *Forness*, 125 F. 2d 928, 932 (C. C. A. 2), where it was held that only the laws relating to the organization and government of municipalities were permitted to be extended to the City of Salamanca by the 1875 Act. While the court below refused to follow the interpretation given to the 1875 Act in the *Forness* case, it approved the result reached therein on the ground that Indian wards were involved (R. 51–52). See also the opinion of the county court (R. 25, 27, 32). Thus, the court below has, in effect, interpreted Section 8 as extending the general laws of the state to the City of Salamanca except insofar as Indians are concerned.[10] However, inasmuch as Section 8 contains a clause specifically exempting Indians and their property from state taxation, it does not seem that under the familiar doctrine of *Expressio unius est exclusio alterius* the exemption of Indians from other laws of the state could thus be implied, if in fact Section 8 envisioned the general laws rather than only laws relating to municipalities. In our view, Congress in Section 8 had in mind only laws relating to municipalities.

[10] As a matter of practice, major crimes involving Indians committed in the city have apparently been considered as falling under the jurisdiction of the federal courts (R. 11, 18–19, 24–25).

By the 1875 Act Congress gave its assent to the establishment of white villages within the Seneca reservations. Prior to this time the Seneca Nation, with the approval of the United States, had placed its tribal government and internal affairs under some measure of control by the State of New York. *United States ex rel.* v. *Tyler,* 269 U. S. 13, 16; *Rice* v. *Maybee,* 2 F. Supp. 669, 671 (W. D. N. Y.). See Cohen, Handbook of Federal Indian Law (1942), pp. 421, 422–423. Moreover, the state already had complete jurisdiction of the white inhabitants of the reservation in their personal relations with each other. (See the discussion *supra.*) Under these circumstances it would indeed have been highly undesirable for the federal government to attempt to supervise the whites in their governmental relationships. It was only natural, therefore, that Congress should make some provision for the inhabitants to organize and maintain local governments under the existing framework of the law of the state which already had jurisdiction over their personal affairs. This is all that was necessary to place the village governments on a sound legal basis independent of federal control, and this is all that Congress did when it said in Section 8 that "all municipal laws and regulations" of New York might be in force within the villages. To give any greater scope to the phrase would be to remove the villages and any Indian property or

inhabitants therein from all federal control. Realizing that this could not be the effect of the statute, the court below reached the illogical conclusion that, while by virtue of the 1875 Act the general laws of New York were extended to the City of Salamanca, yet those laws, to some undefined extent, did not apply to the Indians. But the statute makes no such distinction between Indians and whites except as to taxation. It was the purpose of the statute to define precisely the limits of application of state law and not, as does the conclusion of the court below, create a field of uncertainty as to whether state or federal law applied.

In using the phrase "municipal laws and regulations" in Section 8 it is plain that Congress did not mean the "municipal (or domestic) law" of a state as opposed to its "international (or extra-mural) law" because a state under our Constitution has no "international" law. See *United States* v. *Forness*, 125 F. 2d 928, 932. So to interpret the phrase, as the court below has done (R. 51–55; see also R. 25–32), is to read the word "municipal" out of the statute. Nor does violence to the statute end here. Acceptance of such a version also deletes the carefully phrased provisions of the same Section relating to state highway laws [11] (see Appendix *infra*). The con-

[11] The court below (R. 55) explained the inclusion of the provision with respect to the state highway laws by pointing out that the Seneca Nation was to have the right to extend

struction given to the Act by the court below likewise renders meaningless most of the provisions of Sections 5 and 7 of the Act. If, by Section 8, all the laws of New York State were extended over the City of Salamanca, there was no necessity for providing that leases of lands within the villages should be recorded "in the same manner and with the like effect" (sec. 5) as similar instruments relating to other lands in the county. The provision that leases should pass by assignment "in the manner provided by the laws of said state" (*ibid.*) also becomes surplusage. Again, the specific provision of Section 7 authorizing actions in the state courts for the recovery of rents or for the recovery of possession was needless duplication. There is no warrant for construing the one word "municipal" in Section 8 thus to nullify Sections 5 and 7 and the other provisions of Section 8. Obviously, therefore, Congress used "municipal" in its primary meaning in order to extend to the villages only New York laws regulating local government.[12]

---

those laws to the entire reservation. But, if Congress intended that the general laws were to be extended to the villages, it surely would have said so and then inserted a proviso that the Nation could extend the highway laws to the whole reservation if it so desired.

[12] In reaching an opposite result the court below treated as the best evidence of the proper interpretation of the Act the fact that the New York legislature had in 1881 passed a statute that "all the general laws of the state are extended over and apply to the same" (R. 53). Of course, the interpretation placed on a federal statute by a state legislature is of little weight in interpreting the statute.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed, but on the sole ground that, apart from the Act of February 19, 1875, the State of New York had exclusive jurisdiction of the crime of murder committed by one white man against another on an Indian reservation within the state.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
J. EDWARD WILLIAMS,
Acting Head, Lands Division.
ROGER P. MARQUIS,
JOHN C. HARRINGTON,
WALTER J. CUMMINGS, JR.,
Attorneys.

DECEMBER 1945.

APPENDIX

1. A separate article added to the Treaty of January 9, 1789, 7 Stat. 33, 34–35, between the United States and the Six Nations provides:

> Should a robbery or murder be committed by an Indian or Indians of the Six Nations, upon the citizens or subjects of the United States, or by the citizens or subjects of the United States, or any of them, upon any of the Indians of the said nations, the parties accused of the same shall be tried, and if found guilty, be punished according to the laws of the state, or of the territory of the United States, as the case may be, where the same was committed. * * * And the said nations engage to deliver the persons that may be accused, of their nations, of either of the before mentioned crimes, at the nearest post of the United States, if the crime was committed within the territory of the United States; or to the civil authority of the state, if it shall have happened within any of the United States.

2. Article VII of the Treaty of November 11, 1794, 7 Stat. 44, 46, provides:

> Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other:

> By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

3. The pertinent criminal provisions of the Indian Intercourse Act of May 19, 1796, 1 Stat. 469, are as follows:

> SEC. 4. *And be it further enacted,* That if any such citizen or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: And if such offender shall be unable to pay a sum at least equal

to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: *Provided nevertheless,* That no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

* * * * *

SEC. 6. *And be it further enacted,* That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

* * * * *

SEC. 14. *And be it further enacted,* That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen, or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose;

who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent, or other person authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: And, in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured, an eventual indemnification: *Provided always,* that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: *And provided also,* that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: *And provided further,* that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

4. Section 2145 of the Revised Statutes, 25 U. S. C. sec. 217, provides:

> Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

5. The Act of February 19, 1875, 18 Stat. 330, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all leases of land within the Cattaraugus and Allegany reservations in the State of New York, heretofore made by or with the authority of the Seneca Nation of New York Indians, to railroad-corporations, are hereby ratified and confirmed; and said Seneca Nation may, in accordance with their laws and form of government, lease lands within said reservations for railroad purposes.
>
> SEC. 2. That the President of the United States shall appoint three commissioners, whose duty it shall be, as soon as may be, to survey, locate, and establish proper boundaries and limits of the villages of Vandalia, Carrolton, Great Valley, Salamanca, West Salamanca, and Red House, within said Allegany reservation, including therein, as far as practicable, all lands now occupied by white settlers and such other lands as, in their opinion, may be reasonably required for the purposes of such villages; and they shall cause a return of their doings in writing, together with maps of such surveys and locations duly certified

by them, to be filed in the office of the county clerk of the county of Cattaraugus, in said State, there to be recorded and preserved. The boundaries of said villages so surveyed, located, and established shall be the limits of said villages for all the purposes of this act.

SEC. 3. That all leases of land situate within the limits of said villages when established as hereinbefore provided, except those provided for in the second section of this act, in which Indians or said Seneca Nation, or persons claiming under them are lessors, shall be valid and binding upon the parties thereto, and upon said Seneca Nation for a period of five years from and after the passage of this act, except such as by their terms may expire at an earlier date; and at the end of said period, or at the expiration of such leases as terminate within that time, said nation through its councillors shall be entitled to the possession of the said lands, and shall have the power to lease the same: *Provided, however,* That at the expiration of said period, or the termination of said leases, as hereinbefore provided, said leases shall be renewable for periods not exceeding twelve years, and the persons who may be at such time the owner or owners of improvements erected upon such lands, shall be entitled to such renewed leases, and to continue in possession of such lands, on such conditions as may be agreed upon by him or them and such councillors; and in case they cannot agree upon the conditions of such leases, or the amount of annual rents to be paid, then the said councillors shall appoint one person, and the other party or parties shall choose one person, as referees to fix and determine the terms of said lease and

the amount of annual rent to be paid; and if the two so appointed and chosen cannot agree, they shall choose a third person to act with them, the award of whom, or the major part of whom, shall be final and binding upon the parties; and the person or persons owning said improvements shall be entitled to a lease of said land and to occupy and improve the same according to the terms of said award, he or they paying rent and otherwise complying with the said lease or said award; and whenever any lease shall expire after its renewal as aforesaid, it may, at the option of the lessee, his heirs or assigns, be renewed in the manner hereinbefore provided.

SEC. 4. That said Seneca Nation is hereby authorized, by resolution of its councillors, duly elected according to the laws and system of government of said nation, or in such other manner as said nation in council may determine, to lease lands within said villages to which, by the laws or customs of said nation, no individual Indian or Indians, or other person claiming under him or them, has or is entitled to the rightful possession.

SEC. 5. That it shall be the further duty of the said commissioners to cause all lands within such village now leased, as hereinbefore mentioned, to be surveyed and defined as near as may be, and to cause the same to be designated upon the maps of such villages hereinbefore mentioned and provided for. All leases of lands within said villages, whether now existing or hereafter to be made under the provisions of this act, shall be recorded in the office of the clerk of said county of Cattaraugus in the same manner and with like effect as similar instruments relating to lands lying

in said county outside of said reservations are recorded by the laws of said State of New York. All leases herein mentioned or provided for shall pass by assignment in writing, will, descent, or otherwise in the manner provided by the laws of said State: *Provided, however,* That the rights of Indians in such leases shall descend as provided by the laws of said Seneca Nation.

SEC. 6. That all moneys arising from rents under the provisions of this act which shall belong to said Seneca Nation shall be paid to and recoverable by the treasurer of said Seneca Nation, and expended in the same manner and for the same purposes as are other revenues or moneys belonging to said Seneca Nation.

SEC. 7. That the courts of the State of New York within and for the county of Cattaraugus, having jurisdiction in real actions, and the circuit and district courts of the United States in and for the northern district of said State, shall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions.

SEC. 8. That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said vil-

lages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: *Provided, nevertheless,* That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.

6. Section 9 of the Act of March 3, 1885, 23 Stat. 385, as amended, 18 U. S. C. sec. 548, provides:

> All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within any Indian reservation under the jurisdiction of the United States Government, including rights-of-way running through the reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: *Provided,* That any Indian who commits the crime of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court: *Provided further,* That as herein used the offense rape shall be defined in accordance with the laws of the State in which the offense was committed. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948

SUPREME COURT OF THE UNITED STATES.

No. 158.—October Term, 1945.

The People of the State of New York *ex rel.* Donald A. J. Ray, Appellant, *vs.* Walter B. Martin, as Warden of Attica State Prison, Attica, New York.	On Writ of Certiorari to the County Court of Wyoming County, New York.

[January 7, 1946.]

Mr. Justice Black delivered the opinion of the Court.

In *United States* v. *McBratney*, 104 U. S. 621, this Court held that the State courts of Colorado, not the Federal courts, had jurisdiction to prosecute a murder of one non-Indian by another committed on an Indian reservation located within that State. The holding in that case was that the Act of Congress admitting Colorado into the union overruled all prior inconsistent statutes and treaties and placed it "on an equal footing with the original States . . . "; that this meant that Colorado had "criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation"; and that consequently, the United States no longer had "sole and exclusive jurisdiction" over the Reservation, except to the extent necessary to carry out such treaty provisions which remained in force. That case has since been followed by this Court[1] and its holding has not been modified by any act of Congress. The question this case presents is whether New York, which is one of the original States, has jurisdiction to punish a murder of one non-Indian committed by another non-Indian upon the Alleghany Reservation of the Seneca Indians located within the State of New York.

In 1939, the petitioner was sentenced to life imprisonment in a New York State court for the murder of a man in the City of Salamanca, which is within the Alleghany Reservation but has only 8

[1] Draper v. United States, 164 U. S. 240. See also United States v. Ramsey, 271 U. S. 467, 469; Donnelly v. United States, 228 U. S. 243, 271; United States v. Kagama, 118 U. S. 375, 383.

Indian families living among its 9000 inhabitants. He later brought this habeas corpus proceeding in a county court of the State.[2] He alleged that since the Indian reservation was under the exclusive jurisdiction of the United States, the State courts lacked jurisdiction to try and convict him. The County Court of Wyoming County heard the case and ordered the writ dismissed. 181 Misc. 925. Both the Appellate Division of the Supreme Court, 268 App. Div. 218, and the Court of Appeals, 294 N. Y. 61, affirmed the dismissal.[3] We granted certiorari because of the federal questions raised.

We think the rule announced in the *McBratney* case controlling and that the New York Court therefore properly exercised its jurisdiction. For that case and others which followed it all held that in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries.[4] Petitioner claims that the *McBratney* case differs from this proceeding in several respects. First, he contends that Colorado could exercise greater powers over its Indian reservations than New York can by virtue of the enabling act which admitted Colorado into the union, a similar enactment being lacking here since New York is one of the original states. As we have seen, the Colorado enabling act was held in the *McBratney* case to put Colorado "on an equal footing with the Original States", and to repeal earlier legislation and treaties inconsistent with the enabling act. The fact that Colorado was put on an equal footing with the original states obviously did not give it any greater power than New York. And no greater

---

2 A previous petition in the Federal courts had been denied because relief had not first been sought in the New York State courts. 54 F. Supp. 218; 141 F. 2d. 300.

3 The New York Court of Appeals held, and the State urges here that the State court had jurisdiction by virtue of Section 7 of the Act of Congress passed in 1875, 18 Stat. 330, authorizing certain parts of the Alleghany Reservation to be surveyed for establishment of a number of villages including Salamanca. Section 7 provided among other things that "all the municipal laws and regulations of said State [New York] may extend over and be enforced within said villages." Acting . . . under what it conceived to be the authority granted by this Section, New York passed a law, Chap. 188 of New York Laws of 1881, extending its "general law" so as to apply to Salamanca. Since we think the rule in the *McBratney* case controlling, we find it unnecessary in this case to pass on the scope and validity of this Act.

4 This holding was in harmony with general principles governing this subject. Surplus Trading Co. v. Cook, 281 U. S. 647, 651; Hallowell v. United States, 221 U. S. 317, 320; United States v. McGowan, 302 U. S. 535, 539.

power can be inferred from the repealing function of the enabling act, since, as we shall point out, the statutes and treaties which petitioner claims deprive New York of jurisdiction do not in fact do so.

This brings us to petitioner's further contention that certain Federal statutes specifically grant the United States exclusive jurisdiction over the Seneca Reservation. He points out that the laws of the United States make murder a crime "if committed in *any place* within the sole and exclusive jurisdiction of the United States . . ."; 18 U. S. C. 452; that Section 2145 of the Revised Statutes, 25 U. S. C. 217, makes this murder statute applicable to "Indian country"; and contends that the Seneca Reservation is Indian country, and that consequently New York has no jurisdiction to punish a murder committed on that Reservation. The cases following the *McBratney* case adequately answer petitioner's contentions concerning Section 2145, even if we assume, what we need not decide, that the Seneca Reservation is Indian country within the meaning of the statute. While Section 2145 of the Revised Statutes has been held applicable in territories to crimes between whites and whites which do not affect Indians,[5] the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding Section 2145.[6] See also *New York* v. *Dibble*, 21 How. 366.

Petitioner further contends that the *McBratney* rule is not applicable here because exercise of state jurisdiction over non-Indians at Salamanca would violate the Treaty of 1794, 7 Stat. 586. We can find no language in that Treaty that lends itself to such interpretation. The Treaty was one of peace and friendship between the United States and the Indians. It provided against private revenge or retaliation on account of injuries done by individuals on either side. Such injuries were to be reported by each nation to the other with a view of having the nation to which the individual offender belonged take "such prudent measures . . . as shall be necessary to preserve . . . peace and friendship unbroken."

---

[5] In re Wilson, 140 U. S. 575; Pickett v. United States, 216 U. S. 456, 458.

[6] In Donnelly v. United States, *supra*, 228 U. S. at p. 270, this Court pointed out that the provisions contained in Section 2145 of the Revised Statutes were first enacted as Section 25 of the Indian Intercourse Act of June 30, 1834, 4 Stat. 729, 733. This means that the statute was in effect at the time of the *McBratney* decision. Yet, significantly the Court did not even find it necessary to mention it.

This procedure was to be followed until Congress made "other equitable provision for the purpose." This latter language, upon which the petitioner most strongly relies as imposing a duty upon the United States to exercise jurisdiction over the whole Reservation to the exclusion of the State, even as to offenses committed by whites against whites, cannot properly be interpreted as the petitioner asks. The entire emphasis in treaties and Congressional enactments dealing with Indian affairs has always been focused upon the treatment of the Indians themselves and their property. Generally no emphasis has been placed on whether state or United States Courts should try white offenders for conduct which happened to take place upon an Indian reservation, but which did not directly affect the Indians. Neither the 1794 Treaty nor any other requires a holding that offenses by non-Indians against non-Indians disturbing the peace and order of Salamanca are beyond New York's power to punish.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.